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At. But. Courts.
N O T E S



OF

OPINIONS

AND

JUDGMENTS

DELIVERED IN DIFFERENT COURTS,

BY

THE RIGHT HONOURABLE

SIR JOHN EARDLEY WILMOT, KNT.

LATE LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS,

AND

ONE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

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Page	line	
10.	5.	<i>for sanctified, - - - read sanctioned</i>
98.	11.	<i>after in the, - - - - read Year Book.</i>
113.	1.	<i>for . The, - - - - read , the</i>
114.	9.	<i>for denied, - - - - read desired.</i>
202.	16.	<i>for queritur, - - - - read quæritur</i>
261.	23.	<i>after made, - - - - add (a) and this Note at the bottom of the page. (a) Sir Eardley was at this time in the Court of Chancery, being one of the Commissioners of the Great Seal.</i>
271.	20.	<i>after Court, - - - - add (b)</i>
275.	23.	<i>for obliged, - - - - read obeyed.</i>

A D V E R T I S E M E N T.

SOME Apology may be thought necessary for the Publication of so small a number of Cases as compose the present Volume. The fact is, that some of them having been handed about in Manuscript, and having been made use of in Court, a strong opinion was expressed by several Gentlemen of the Profession, that, however few in number, they were too valuable not to be made public.

They were certainly not intended by the learned Judge for publication, and some of them are not perfect. There is no doubt but they would have been all equally valuable, if they had all received his last Correction; and still more, if his modesty had permitted him to revise them with a view to publication. As it is, the Profession and the Public will make allowance for the disadvantages under which they are presented to them.

OPINIONS AND JUDGMENTS,

BY

LORD CHIEF JUSTICE WILMOT.

IN CHANCERY.

The ATTORNEY GENERAL, at
the Relation of the UNIVERSITY of
CAMBRIDGE, against - - - - } LADY DOWNING and others.

SIR GEORGE DOWNING, of Gamlingay, in the County of Cambridge, Baronet, being seised of, or otherwise entitled in fee-simple to divers freehold, copyhold, and leasehold estates, in the counties of Cambridge, Bedford, and Suffolk, by his will, bearing date the 20th of December 1717, gave and devised all his manors, lands, tenements, and hereditaments, both freehold and copyhold, as well as leasehold for years, situate, lying, and being, in the several counties of Cambridge, Bedford, and Suffolk, and elsewhere, with their rights, members, and appurtenances, unto JAMES Earl of SALISBURY, CHARLES Earl of CARLISLE, the honourable NICHOLAS LECHMERE, Chancellor of the Dutchy of Lancaster, JOHN PEDLEY and ROBERT PULLYN, esquires, To hold all full of the said manors, hereditaments, and premises, whereof he was seised of any estate of

B

inheritance,

1767.

Attorney General against Lady Downing and others.

v. Ambler, 550, & 3 Vesey, jun. 714.

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against
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ing and
others.

inheritance, or freehold, unto them and their heirs, upon the uses, trusts, intents, and purposes in his said will after declared, limited, and appointed, concerning the same; and to hold all such of the said manors, hereditaments, and premises, whereof he had any estate for any term or terms of years, unto the said trustees, their executors and administrators, upon the uses, trusts, and purposes, therein likewise after declared, limited, and appointed, concerning the same: And he did by his said will limit and appoint all such of his said manors and hereditaments, whereof he was seised of any estate of inheritance or freehold, to the use of his cousin JACOB GARRET DOWNING, son and heir apparent of his uncle CHARLES DOWNING, for the term of his natural life, without impeachment of waste; and immediately from and after the determination of that estate, to the use of the said trustees, and their heirs, to preserve contingent remainders; and from and after the decease of him the said JACOB GARRET DOWNING, to the use of the first son of the body of the said JACOB GARRET DOWNING, in tail male; and for default of such issue, to the use of the second, third, fourth, fifth, and every other son and sons of the body of the said JACOB GARRET DOWNING, severally and successively in tail male; and for default of such issue, to the use of the second, third, fourth, fifth, and every other son and sons of the body of the said CHARLES DOWNING, successively in tail male; and for default of such issue, to the use of THOMAS BARNARDISTON, of Bury St. Edmund's, in the county of Suffolk, esquire, son and heir apparent of his aunt ——— BARNARDISTON, wife of THOMAS BARNARDISTON, during the term of his natural life, without impeachment of waste; remainder to trustees, to preserve contingent remainders; remainder to the use of his first and other sons successively

ſucceſſively in the ſame manner; and for default of ſuch iſſue, to the
 uſe of his couſin CHARLES PETERS, then or late of the Univerſity of
 Oxford, for the term of his natural life, without impeachment of
 waſte; and immediately after the determination of that eſtate, to the
 uſe of the ſaid truſtees, to preſerve contingent remainders; and im-
 mediately from and after the deceaſe of the ſaid CHARLES PETERS,
 to the uſe of the firſt and other ſons of the body of the ſaid CHARLES
 PETERS, in the ſame manner; and for default of ſuch iſſue, to the
 uſe of his couſin JOHN PETERS, then or late of the ſame Univerſity,
 brother of the ſaid CHARLES PETERS, during the term of his na-
 tural life, without impeachment of waſte; and from and immediately
 after the determination of that eſtate, to the ſaid truſtees, to preſerve
 contingent remainders; and immediately after his deceaſe, to the
 uſe of the firſt and other ſons of the body of the ſaid JOHN PETERS,
 in the ſame manner; and for default of ſuch iſſue, to the uſe of the
 ſaid truſtees, and their heirs, in truſt, “ That they do and ſhall, ſo
 “ ſoon as may be, by, with, and out of the rents, iſſues, and profits
 “ of the premiſes, buy and purchaſe the inheritance and fee-ſimple
 “ of ſome piece of ground, lying and being within the town of Cam-
 “ bridge, proper and convenient for the erecting and building a Col-
 “ lege, and thereon ſhall erect and build all ſuch houſes, edifices, and
 “ buildings, as ſhall be fit and requiſite for that purpoſe; which Col-
 “ lege ſhall be called by the name of DOWNING College; and my will
 “ is, that a CHARTER-ROYAL be ſued for and obtained for the founding
 “ of ſuch College, and incorporating a body collegiate by that name,
 “ in and within the Univerſity of Cambridge, which College or col-
 “ legiate body, ſhall conſiſt of ſuch head or governors, and of ſuch
 “ fellows, ſcholars, members, and other perſons for the time being,

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 neral againſt
 Lady Down-
 ing and
 others.

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“ and shall be maintained, governed, and ordered by such laws,
 “ rules, and orders, and in such manner, and therein shall be pro-
 “ fessed and taught such useful learning as my said trustees, or their
 “ heirs, by and with the consent and approbation of the most reve-
 “ rend the archbishops of Canterbury and York, and the masters
 “ of Saint John’s College and Clare Hall, in the said University of
 “ Cambridge, in being at the time of the founding of the said college,
 “ shall direct, prescribe, and appoint; and immediately from and
 “ after the founding and incorporating such College or body colle-
 “ giate as aforesaid, the said” trustees, “ and their heirs, shall stand
 “ and be seised of all and singular the said manors, lands, tenements,
 “ and hereditaments, in trust for the said collegiate body and their
 “ successors for ever.” And as for and concerning such of the said
 manors, hereditaments, and premises, whereof he was possessed of any
 estate for term or terms of years, he declared and appointed that the
 said trustees, and their executors and administrators, should from time
 to time assign and convey the same unto such person and persons as
 should be entitled to the actual possession of his said lands of inheri-
 tance, by virtue of the limitations thereof in his said will before men-
 tioned: provided always, that if any of the said lands and premises
 should come to or be vested in any male person or persons, whose
 surname should not be DOWNING, then such person or persons should
 thenceforth take the name of DOWNING only; and upon refusal
 or neglect to take the said surname of DOWNING in manner afore-
 said, then the uses and limitations to the person or persons so refusing
 or neglecting, to be void, and the premises to go and remain to such
 person and persons, and to such uses, as the same would or should do
 by virtue of any of the limitations before mentioned, in case the
 person

person or persons so refusing or neglecting to take the surname of DOWNING had been naturally dead; and as for his personal estate, he gave all his goods and chattels unto his said cousin JACOB GARRET DOWNING, whom he constituted sole executor of his will. By a codicil to his will, the said testator gave two annuities, and charged all his lands with the payment thereof.

Attorney General against Lady Downing and others.

The testator, Sir GEORGE DOWNING, died on the 20th of June 1749, without issue, leaving Sir JACOB GARRET DOWNING his heir at law, who entered upon the freehold, copyhold, and leasehold estates of the testator, and enjoyed them till his death in 1764. He never had any issue; and THOMAS BARNARDISTON, CHARLES PETERS, and JOHN PETERS, died in his life-time, without having had any issue; nor was there any other son of CHARLES DOWNING, or of the testator's aunt, ——— BARNARDISTON. All the trustees died in the life of the testator Sir GEORGE DOWNING.

Sir JACOB GARRET DOWNING, by his will, dated the 12th of August 1763, gave to his wife, Lady DOWNING, and to her heirs, executors, administrators, and assigns, all his real and personal estate, charged with the payment of several legacies and annuities, and appointed her sole executrix. Upon his death in 1764, she entered upon all the freehold, leasehold, and copyhold estates, devised by Sir GEORGE DOWNING.

On the 9th of May 1764, the Information was filed against Lady DOWNING, and the heirs at law of Sir JACOB GARRET DOWNING, and the other proper parties; praying that the will of Sir GEORGE DOWNING might be established, and the trusts thereof carried into execution; that an account might be taken of the money received by Lady DOWNING from the rents and profits of the said freehold, copyhold

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copyhold, and leasehold estates, become due after the death of Sir JACOB GARRET DOWNING, and that a Receiver might be appointed.

This cause was heard before the Lord Chancellor CAMDEN, assisted by Sir THOMAS SEWELL, Master of the Rolls, and Lord Chief Justice WILMOT, on the 19th and 27th of May, and the 18th of July 1767; and on the 17th of June 1768, Lord Chief Justice WILMOT delivered his opinion as follows :

THIS CASE, on which your Lordship has done me the honour of asking my opinion, comes before the Court upon an Information, brought by his Majesty's Attorney General, to have an execution of the trusts of the will of Sir GEORGE DOWNING; and in order to deliver my sentiments to your Lordship with as much perspicuity as I can, I will, first, very shortly state the case, and then mention the questions, under which I mean to consider it.

Sir GEORGE DOWNING, seised of an equitable estate in fee, and having several relations, by his will, 20th December 1717, devises all his manors, messuages, lands, tenements, and hereditaments, to five trustees and their heirs, to the use of his nephews and other relations, and their issue male, in strict settlement; and for default of such issue, he directs that his trustees should buy a piece of ground in Cambridge, and build a College upon it, to be called DOWNING College; and that a CHARTER-ROYAL should be sued for and obtained for the founding such college, and incorporating a body collegiate by that name, in and within the University of Cambridge, to consist of such persons, and to be governed by such rules, and to profess and teach such useful learning therein, as his trustees, or their heirs, with

with the consent of the archbishops of Canterbury and York, and the masters of St. John's and Clare Hall, in being at the time of founding such College, should direct and appoint; and immediately after such foundation, he directed that his trustees should stand seised in trust for such collegiate body and their successors for ever. He then directs, that such of the persons in the succession, whose surnames were not DOWNING, should take that surname upon them; and makes JACOB GARRET DOWNING, who was the first person named in the succession, his executor.

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Sir GEORGE died the 10th of June 1749, thirty-two years after making the will, and the five trustees all died in his life-time, and consequently the devise to them, whether of the legal or equitable estate, became a lapsed devise.

The devisees named in the will, are also all dead without issue male, and the present Information is now brought, at the relation of the Chancellor, masters, and scholars of the University of Cambridge, against the devisee and heirs at law of Sir JACOB DOWNING, who was heir at law of Sir GEORGE DOWNING, and against the two archbishops and the masters of St. John's and Clare Hall, for the establishing the will of Sir GEORGE DOWNING, to have the trusts thereof performed and carried into execution, and for directions relating thereto.

The defendant, Lady DOWNING, the devisee of Sir JACOB DOWNING, who was the heir of Sir GEORGE DOWNING, insists, by her Answer, that she is entitled to the inheritance of the estates devised by the will of Sir GEORGE DOWNING, and that the trusts for founding and endowing a College are void.

The

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others.

The heirs at law put in the common Answer, claiming the estates, if the wills are not well proved.

The archbishops, and masters of St. John's and Clare Hall, by their Answers, declare they are ready to act, as this Court shall judge proper, for the founding and establishing a College, according to the directions of the will of Sir GEORGE DOWNING.

I think every thing urged at the bar in this Cause will fall under three general questions.

1. First, whether the trusts are illegal and void.
2. Second, if not illegal and void, whether they are of such a nature, as that a Court of equity, under the particular circumstances of this case, ought to aid and assist them, or leave them where they lie, or at least not interpose till a College is incorporated, and a licence to take in mortmain is obtained.

3. Third, supposing the trusts illegal and void, or of such a nature as not fit to be carried into execution by a court of equity, whether this court will apply the estate to some other charity, *ejusdem generis*, and as near the testator's intention as the rules of law and equity will permit.

1. As to the first question,

It is agreed, that this devise in the will is not affected by the 9 Geo. II. which passed in 1736, nineteen years after making the will, and indeed Ashburnham's case (a), which was said in that case to be warranted by an antecedent determination of a similar nature on the statute of frauds, has settled the law on this point; and therefore, if the trust was not illegal and void when the will was made, that statute will not make it so; but it must be considered exactly

(a) Ashburnham v. Bradshaw, 2 Atk. 36. Barnard. Ch. Rep. 6.

exactly in the same manner as it must have been if that statute had never been made.

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I will consider the use made of that statute, against this Court's supporting or reviving the trusts, under the second question, as I wish to keep the questions separate, and not to confound reasons, which apply to the *discretion* of the Court against *executing* the trust, with reasons urged to evince the *illegality* of it.

In order to examine the legality of this trust, it is necessary to enquire, how the law stood, before the 9th Geo. II. was made, as to alienations in mortmain? And they were certainly first prohibited to be made to the clergy by conditions inserted in the deeds of private persons. Magna charta was the first public legislative injunction against them.

It was the interest of the king and the lords, in respect of the tenures, and for the benefit of the community, to check them.

The 7th of Edward I. extended the prohibition to all secular and lay corporations as well as religious, and was intended to prevent all devices, by which lands might be got into their hands.

13th Edward I. c. 32. guards against collusive recoveries.

18th Edward I. *Quia emptores terrarum*, repeats the general prohibition to prevent any construction or inference being drawn from that statute in their favour.

15th Richard II. c. 5. puts uses exactly in the same predicament as legal estates.

But it is observable, that these alienations in mortmain were never made void, so as to let in the grantors or their heirs at law, but the laws only gave a right to the mesne lords and the king to seize them

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them as forfeited; and, therefore, if they remitted their right, the alienation was good; and that option produced those dispensations with these laws, called Licences to alien in mortmain, which continued till the Revolution, and were revived again by 7 & 8 William III. c. 37, and are so fully sanctified by that act, that it would be a vain and futile disquisition, either to run through the history of those licences, and trace their progress from their commencement, or to examine the legality of them upon the principles of the Constitution. It is sufficient to say, that, except in the interval between the Bill of Rights and the 7 & 8 Wm. III. c. 37, a power of alienating in mortmain with licence has always been an exercised power of property, and that statute of 7 Wm. III. shews it to be the sense of the legislature, that it was fit it should continue so. And alienations in mortmain differed very materially from alienations to superstitious uses, prohibited by the 23d Hen. VIII. c. 10; for they are declared to be utterly void, and of no virtue, strength, or effect in law; and if estates given to such uses had not been afterwards given to the king, the grantors and their heirs, in consequence of the nullity, would have been let into the estates: whereas the grantors and their heirs were bound by alienations in mortmain, and the lords and the king only could avoid them.

And before the statute of Wills, where there was a custom of devising, a licence was necessary to legitimate such a devise, unless the custom authorized it; and year-book, 45 Edw. III. 26. proves that position, where the king seized, because the devise was in mortmain, and the donor was not such a person, as was within the custom of devising in mortmain, which extends only to those who
are

are natives and inheriting lands within the city, or resiants and taxable to scot and lot (*a*); and as the devisor did not fall under those descriptions, the custom did not extend to him.

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The 32d Hen. VIII. c. 1. gives a general liberty of devising at the devisor's free will and pleasure, but the explanatory act of 34 Hen. VIII. c. 5. excepts bodies politic and corporate: so that devises to corporations were void; they could not be dispensed with, and the heir at law took the estate.

(*a*) "A ceux queux sont nés & inherites en mesme la Citie par voye de heritage, ou que sont resiaunts & taxables al scot & lotte."

The 1st and 2d Ph. and M. c. 8. f. 50. took off this restraint in favour of spiritual corporations for 20 years; and Colleges were so much the favourites of the law at that time, that a devise to Trinity College, though a lay corporation, was held to be within the protection of that law, because Divinity was studied in it. Dyer, 255. 1 Roll. Rep. 166. 418. Hob. 122 & 123. 11 Co. 71. But when 20 years expired, spiritual corporations, as well as others, were incapable of taking by devise. And from that time to the 43d Eliz. corporations could not take by devise at all (except under custom of devising in mortmain) either with licence or without it.

But then comes the statute of 43 Eliz. c. 4. with such medicinal qualities in it, as to heal every imperfection in a charitable disposition, provided the party had a legal capacity to give at all.

The title of the Act, and the principal object in the view of the legislature, was to redress misemployments of real or personal estates given to charitable uses.

But the judges in queen Elizabeth's time, having in Porter's case, 1 Coke (which was followed by another of Martindale and Martin, Cro. Eliz. 288.) made a very favourable construction of 23 Hen. VIII. in support of uses really meritorious: the judges in king James's time,

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animated with an equal spirit of piety, were determined to keep pace with their predecessors, and perhaps to go beyond them, by a most enlarged liberal exposition and application of this statute of 43 Eliz. I call Porter's case a favourable exposition of 23 Hen. VIII. c. 10. because the reason of the law, given in the preamble, respected meritorious uses equally with superstitious ones: for the reason given is, that grants to such uses were as prejudicial to the king and the lords, as in cases where lands were aliened in mortmain.

Now that loss and inconvenience were the same, whether the use was a real pious use, or a superstitious one.

The words laid hold of by the Judges, in 43 of Eliz. were the words, *limited and appointed*. If there was a gift in fact, a limitation and appointment made in fact, by a person who had a legal capacity to give in any way, they considered that intention improperly executed, to be a foundation for supplying any imperfection in the mode of donation; and that the legislature intended, if estates were given in fact, defects in form were not to be attended to, and they were to let the charity take place.

How was this to be done? Before the statute of wills, lands were not devisable at all, and by the statute of wills, they could not be devised to corporations, and licences in mortmain would have been necessary, if they could have been so devised. The judges therefore could not say the devises were good at law; and therefore they left the legal estate to follow the course of the law, but considered the devise as an equitable declaration of the trust of the estate, and as a valid limitation and appointment of the *utile dominium*, which was what they thought the legislature had their eye upon, and meant by the 43 Eliz. to subject to the regulations made by that statute.

A stronger

A stronger case could not well arise than Collison's case, in Hob. 136. and Moor 888. A devise made in 25 Hen. VIII. before this statute of wills, of a house and land, not devisable by any custom, nor estated in use to any, to his wife for life, and the rents then to be employed for the repair of a highway. Decree for a highway. On appeal it was referred to Mountague and Hobart, and they were of opinion, that the intended devise is a limitation or appointment to a Charitable use, to be relieved by the 43 Eliz. and the Chancellor confirmed the decree upon exceptions taken by Rolt the heir at law, to whom that estate was descended. A most violent retrospective relation, to make a devise void at law, a good one in effect in equity.

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Flood's case, Hob. 136, is the devise of a remainder to a corporation. The judges held the devise to be void at law, but clearly within the relief of the statute of 43 Eliz. and it was decreed, that the College should enjoy it against the ward and his heirs. And it was said (a), that the proviso, exempting Colleges, was not intended to restrain gifts made to them, but only to exempt them from being reformed by Commission.

(a) It is so mentioned in the Decree.

Duke's Charitable Uses, 77, case 16. The same doctrine laid down in favour of a devise to St. John's College in Cambridge.

The King and Newman, 1 Lev. 284. It was held by Lord Keeper Bridgman, that a devise to Trinity College was good by 43 Eliz. notwithstanding the statute of mortmain.

These cases have so fully settled, that devises to corporations in *esse*, are good appointments of the trust in equity, notwithstanding the statutes of mortmain, and the exception of corporations in the statute of wills; and this court has so uniformly established these devises upon the strength of these decisions for near a century and a

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half, that it is really unnecessary to speculate minutely upon Colleges or the University being within the words of the 45 Eliz.; but I own the proviso in the act is a strong legislative exposition of the extent and meaning of the word in the antecedent clause. For if they had not considered them as falling directly under the enacting clause, the proviso was vain and useless; and the proviso is by Sir T. Moore, Duke 171. taken by equity to extend to the University, which is a body politic, though Colleges only are mentioned.

And, indeed, I think Universities and Colleges are within the proper and genuine sense and meaning of the words, "Schools of learning."

The places where the public exercises are performed, are called the Schools. An University is a great School, incorporated to instruct, by their professors and regular exercises, all who come to study there, and by degrees to give their students rank and credit in the republic of letters, and which are qualifications for lucrative offices and employments in life. It is a public School of divinity, physic, law, and all arts and sciences. And Colleges are Schools of learning, furnishing scholars for the universal School, which is a combination of all those Schools: and in any other view, than as Schools of learning, they are as useless to society as Monasteries: and therefore I think they are not only within the equity of the act, but the words of it.

And I consider this devise as made for the further augmenting of the University; and for that reason the University, in its corporate capacity, is very properly made a Relator in this Information, being materially and essentially interested in the benefaction.

For though the University is not a corporation of Colleges, but of matriculated members, and all Colleges are distinct and separate corporations, yet these Colleges attract and furnish the members to be matriculated,

matriculated, and every new College enlarges the universal School, and by increasing the number of scholars, adds weight, dignity, and strength to the University.

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And therefore, if an object in *esse* was necessary, the University is that object in *esse* to take and accept this benefaction *instantly*, subject to that controuling power, which, by the fundamental law of the land, is given to the King, in respect of the medium through which they are to receive the benefit of it.

And the further augmenting of the Universities is a good and godly use.

1 Edw. VI. c. 14. expressly calls it so. Erecting grammar schools, further augmenting Universities, and the better provision of the poor and needy, are there mentioned together, as good and godly uses, and recommended to the king's care and protection in the distribution of the estates given him by that Act.

But another objection is then made to this devise. That it is a devise to a non-entity, and that it depends both upon the consent of the University and the Crown, whether there ever will be such a being or not.

First, I shall consider how the law stands as to devising legal estates to persons not in *esse*, either in possession or remainder.

A devise to A. B. the first son of C. whether in possession or remainder, is void, if there be no such person as A. B. when the will was made; because the devise proceeds upon a supposition, which is false, and the foundation of the devise fails as to the object. But a devise in possession to a person not in *esse*, by description which manifests the testator's knowledge of his not being in *esse*, will be good,

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good, if the existence of that person does not depend upon too remote a contingency.

A devise to the eldest son, which A. B. shall have, will be good as an executory devise, because the testator does not mean a person in being, and the contingency must happen in the compass of a life: so a remainder to the first son of A. B. will be good, provided that first son exists before all the precedent estates are determined: and therefore, a remainder limited of the legal estate to a College, not existing, would have been void, just as a remainder limited to the first son of A. B. would have been void, if he had not existed when the preceding estates determined.

But executory trusts fall under a very different consideration; for when the freehold is put into trustees, and the *vacuum*, which the law so much abhors, is thereby avoided, a trust to arise out of a remainder for a person not existing, but who must exist within the compass of a life or lives in being, will be as good, and to be supported by a court of equity as much, as a trust for a person in *esse*: and therefore, suppose a remainder, limited to trustees and their heirs, in trust for the first son which A. B. shall have, and his heirs; the trust, being in the mind and intention of the testator for a person not then existing, but to exist, and where that existence must happen within the compass of a life or lives, would be clearly good. So in this case, the testator does not only declare his intention to give to a person not in *esse*, but is actually giving directions for the creation of that person; and there is no difference between the cases, but that one is an executory trust for a natural person to be created, and the other is for a political person to be created.

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But then it is said, it depends entirely upon the pleasure of the Crown, whether such a College shall ever exist or not; and it equally depends upon the will of God, whether A. B. shall ever have a son or not: and one event may wait a whole life, whereas the will of the King may be known as well in six months as six years, allowing time for the most mature deliberation; so that the contingency is greatly within the time allowed by the law for the expecting executory trusts to arise.

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As to the consent of the University, if it be necessary, they are relators, and have thereby signified their consent to the devise *in toto*: and perhaps the words in the will, in and within the University of Cambridge, only mean the town of Cambridge; and in common parlance, they are often used as synonymous. In Popham, 56. 57. *Academia*, and city or town, are determined to be the same. But I think it more probable, the testator meant, that his College should be put upon the same footing, and have the same relation to the incorporation of the University, as the rest of the Colleges there.

If there is nothing in the trust to draw the condemnation of this Court upon it as illegal and void; then comes

The second question.

Whether the trust is of such a nature as that, under all the circumstances of this case, a Court of Equity ought to give any aid or assistance towards the execution of it, or at least if it is not a premature application?

The discretion of this Court, in the execution of trusts, is a very wide and extensive subject to range over, and no exact, precise boundary lines can or ought to be drawn upon it.

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It is difficult to limit the extent of it with precision ; but it must, like legal discretion, be governed, directed, and regulated by constitutional, legal, and equitable principles, applied to the case under consideration : and therefore, unless there is some latent vice in this trust, repugnant to these principles, the Court will not refuse to execute it.

Cases of that kind might be put, and have happened ; and whether this is one of those cases, or not, is now the question.

In one respect, this trust comes before the Court in a much more favourable light than any which have been mentioned, or indeed, which generally have existed.

Dispositions of this kind generally work an immediate disinherison of the heirs at law, and often proceed either from minds inflamed with anger and resentment against their own family, or overcast with gloomy and melancholy reflexions upon their approaching dissolution.

No such ingredients are to be found in this Case ; no anger nor resentment to his family : he has not only provided for all the male line of his family, but for some of his cousins descended from females ; and he has substituted this memorial of himself and his family, after so many lines of succession, and at so remote a distance, that the inheritance, subject to the antecedent limitations in the will, was of little or no value when the will was made.

And it was not any sudden start, or the effect of any cloudy dis-tempered moment, for he lived two-and-thirty years after he made the will, without making the least variation in this part of it : and therefore the case stands clear of all the compassion, which regard
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for families, very properly and laudably, produces in all courts of justice.

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The 9 Geo. II. c. 36. has been urged as furnishing a motive for this Court not to interpose, in two views :

First : Because, whatever the trust was, in its creation, it is illegal now ; and therefore this Court ought not to execute it, and should regulate their discretion by what the law now is, and not by what it was when the will was made.

Secondly : That the devise of the estate being lapsed by the death of the trustees, the testator himself, after the statute of mortmain, could not have set the legal estate up again ; and that this Court ought only to supply what the testator could have supplied, and ought not to call forth this legal estate to support and save this trust, which by his will the testator could not have done. And it was argued by Mr. Harvey, that these were personal powers to be executed only by the trustees named in the will.

To answer these Objections, I do not think it necessary to give any opinion upon the operation that statute would have had on this will, in case it had been made subsequent to it.

If it is to be considered as a devise in trust for the University, (" for augmenting the University," as the 1 E. VI. expresses it) or, by a liberal construction of the Proviso, for a College to exist in the University, the trust would be lawful now ; but suppose it not within the Proviso, and that such a trust could not now be created by will ; yet if the Act, as it is admitted, do not extend to the devise at law, how can this Court say, it does extend to it in equity ? for equity must follow the law, and the devise must be either good or void *in toto*, in both Courts.

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And if the Court says, they will not execute such a trust, it is exactly the same thing, as if they said, the trust was void. For no other Court can execute it.

I cannot see the least difference between saying the trust is void by the statute, and that the statute furnishes a reason precluding the Court from executing it.

(a) Ashburn-
ham v. Brad-
shaw. ub. sup.

It is admitting the authority of Ashburnham's case (a), and at the same time denying the consequences of it.

Giving the statute a retrospective relation and influence upon the trust, would be breaking in upon that uniformity of judgment, which Courts of law and equity so anxiously study to preserve in the construction and execution of acts of parliament.

The Law says, it is a good devise, unimpeached by the statute: Equity admits it, but says, I will not execute it—I will stand neuter, quiescent, and inactive. Pursue the consequences of such a neutrality: the trustees, if now living, must have kept the estate themselves. For if it is a valid disposition of the whole legal and equitable estate, there can be no resulting trust for the heir at law; or if there was, and this Court stands neuter, what other power in this kingdom can give that trust any effect?

I have no such idea of the jurisdiction of this Court: it is as much bound to act and decide upon a trust estate, as a court of law is upon a legal one.

But it has been said, the Court is not called upon to act against a trustee, but against an heir at law.

In the first place, Lady DOWNING is not the heir at law, but the devisee of the heir at law; and though she stands in his place, yet in the present state and situation of things, the heirs at law of the family

family are as much disinherited by letting her keep the estate, discharged of the trust, as by compelling a performance of it: but suppose she was the heir at law, I take it to be a first and fundamental principle in Equity, that the trust follows the legal estate, where-soever it goes, except it comes into the hands of a purchaser for a valuable consideration, without notice.

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And an heir, whom the law calls, "*eadem persona cum antecessore*," can never be under a less or more imperfect obligation to perform the commands of his ancestors, than a mere stranger: and especially, in a case where Sir JACOB DOWNING (in whose place Lady DOWNING now stands) took so great an interest in this very estate, so vast a fortune from the bounty of that ancestor, whose commands are now disputed. I never heard any distinction made, nor has any Case been cited to prove, that a trust fit and proper to be executed against a trustee, should be suffered to fall to the ground, and remain unexecuted, against an heir at law, where there was no trustee.

2 Vent. 349. Devise by an impropiator to a curate, and all who should serve the cure after him, shews, that where the devisee was incapable of taking for want of being incorporated, the Court decreed, that the heir of the devisor should stand seised in trust for him.

But to avoid citing cases on so plain a point, I will only refer to all the cases which have been determined from the 43 Eliz. to this time, upon devises to corporations. For the words "limited and "appointed," do not carry the legal estate; they only operate as declarations of trusts, or gifts of the *utile dominium*, and bind the legal estate in the hands of the heirs at law.

And in the present case, the legal estate was not devised by the will. For by the Answer it appears to have been conveyed to Sir

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GEORGE DOWNING in 1721, four years after the will was made; and it was admitted on both sides, that Sir GEORGE DOWNING had only an equitable estate, when the will was made; and therefore the question cannot be varied by any lapse of the legal estate, because there was no legal estate ever devised, to lapse. But, if it had been devised, the lapse of the legal estate never has the least influence upon the trusts, to which it is subject.

Trust estates do not depend upon the legal estate for an existence. A Court of Equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate, or of one another; and the legal estate is nothing but the shadow which always follows the trust estate, in the eye of a Court of Equity.

Another argument has been urged from 9 Geo. II. that the testator could not have set the legal estate up again after that statute was made, and that this Court ought to do nothing more than what the testator himself might have done.

(a) 1 Vez. 178
& 186.

The case of Willet v. Sanford, 20th December 1748, (a) was cited to shew, that the testator might, by a codicil, have supplied the legal estate, but that case does not prove that position.

[His Lordship here stated the case.]

This case does not prove that the legal estate of the premises devised by the will, was well devised by the codicil to the two new trustees, in conjunction with the three old trustees named in the will.

But it was held by the Court, that the codicil enured, not as a revocation, but as a confirmation of the will, in respect of the charity: that the trusts in this will were not affected by the codicils,

except in postponing one nephew to another. And the operation of the codicil upon the legal estate, as to the two new trustees, was not argued, nor any part of the determination.

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And the true answer to that objection is, that it proceeds upon presuming, that the trust was affected by the lapse of the legal estate,—that the trust fell with it, and that the legal estate must be set up again to re-animate the trust; whereas the trust stands exactly as it did, unaffected both by the lapse and the statute. And the Court is not setting up the legal estate to impart an activity to the trust, but following the legal estate into the hands of the heir, instead of the trustees; not supplying what the testator could not have done, but acting exactly in the same manner as it would have done in case no trustees had been named at all, or if they all had refused to act in it.

And surely the casualty of a lapse of the legal estate, if there had been one, would have been too fine a thread to have hung this Cause upon. It would have been a total inversion of the principles and practice of this Court, which makes the legal estate always follow the trust, and never suffers the legal estate to lead it.

As to these powers being personal to the trustees, and by their deaths become unexecutable; they are not powers, but trusts; and there is a very essential difference between them.

Powers are never imperative: they leave the act to be done at the will of the party, to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.

This Court supplies the defective execution of powers, but never the non-execution of them: for they are meant to be optional. But
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the person, who creates a trust, means it should at all events be executed.

The individuals, named as trustees, are only the nominal instruments to execute that intention. And if they fail, either by death, or being under disability to act, or refusing to act, the constitution has provided a trustee. The King, as *parens patriæ*, has the superintending power over all charities, abstracted from the statute of 43 Eliz. and antecedent to it, 2 P. Wms. 119; and that paternal care and protection is delegated to this Court.

Where no trustees are appointed at all, this Court assumes the office in the first instance; and in the event which hath happened, it is the same as if no trustees had been appointed at all.

There is some personality in every choice of trustees, but this personality is *res unius ætatis*. In perpetual charities, where the persons, upon whom the trust may devolve, do not exist, the personal confidence can be only in this Court; and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the Constitution has substituted in its place. And as a question of intention, nothing can be clearer.

A College is to be founded under the eye of five trustees. That cannot be. The death of the trustees frustrates that medium.

What then? Must the end be lost, because the means are, by the act of God, become impossible? Suppose the question was asked the testator, If trustees die or refuse to act, do you mean no College at all, and the heirs to take the estate?

No—I trust them to execute my intention! I do not put it into their power, whether my intention shall ever take place at all.

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And the Attorney General and Hickman (*a*) is an authority in point, that this Court is to execute trusts as personal as can be created.

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The Trust has then been attacked as not meritorious, as ostentatious, repugnant to commercial principles, useless, and prejudicial to the public, by throwing so large an estate into mortmain.

(*a*) Kelynge's Select Cases in Chan. 34.

I shall consider these Objections separately.

A Gift for the advancement of useful Learning is the most meritorious charity that can be given. Most charities terminate with individuals, who are the objects of them. But donations of this kind are benefactions to the whole community. They furnish the means of bringing great parts and natural abilities out into public service, and thereby become a charity not only to the persons who are so helped forwards in their education, but to the whole society, which reaps the benefit of those parts and abilities in the several stations of life, where Providence places and employs them; and as Coke, in arguing Porter's case, says, "No time was ever so barbarous as to "take away erudition and science."

All people have at all times thought it most meritorious to promote and encourage them. Even Omar, who directed the Alexandrian library to be burnt, did not wage war against useful learning; but thought, if the learning contained in those books did not agree with the Alcoran, it was noxious; and if it did, it was useless.

It has been observed, that it is an ostentatious attempt to perpetuate the Testator's name.

Wishes of this kind often influence the wisest and best of men. There is nothing immoral in yielding to such a motive, if it was the sole and only motive of such a disposition. It is a passion implanted in the mind, as a laudable incentive to industry, and the reward

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promised Abraham for his faith: "I will make thy name great among the nations."

(a) The devisees in remainder prior to the estate to the trustees for the charity.

The BARNARDISTONS and PETERS's (a) are to change their name, but that circumstance will not affect the validity of the devise; and why should that circumstance be more disgustful in one case than the other? To raise and establish a family in the testator's name and blood, was his first object: natural affection was the principle of that provision. To perpetuate his name by the medium of a College for the good of mankind, was his next object: social affection was the principle of that provision.

Admit that vanity had some share in both the dispositions: it loses all its malignant qualities, when it is productive of good. And in Popham, 139. ascribing charitable gifts to vain glory and ostentation, is said to tend to a public wrong, because it deters and discourages them; and perhaps the world owes some of the greatest and noblest benefactions to this motive, acting in a thousand shapes and forms. It is a spring not to be checked and stopped up; because, under the direction of good laws, it becomes an inexhaustible source of benefits to mankind: And Courts of Justice are not to examine, like casuists, the motives of such dispositions, but to execute or condemn them, according to their own intrinsic merit or demerit, let them proceed from what motive they will.

Another Objection to this Charity has been, that it is useless, unnecessary—that there are Colleges enough already, and those not full.

If the College to be founded was directed to follow exactly the plan of the Colleges already established, there might be more weight in this objection than the last. But the framing of the laws, rules,

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and orders, for the government of it, and the useful learning to be taught there, is left at large to the Trustees nominally, but in reality to the two Archbishops, and the Masters of St. John's and Clare Hall; under a well-grounded hope and expectation, that such an establishment would be made, and such a system of government and study introduced, as might greatly improve an academical education.

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The Testator could not expect that the Trustees, particularly named, should survive so many estates of inheritance as are limited before this devise was to take place, and therefore the confidence was in the Archbishops and Masters, who should be in being at that time. He did and might safely rely upon their ability and integrity to adapt and fashion this College to the time of its foundation; to reject all the weeds and to plant all the flowers which are to be found in every other system of education, ancient or modern, either at home or abroad.

Another Objection has been made to this Trust, that it is repugnant to commercial principles, and prejudicial to the public, by throwing so much land into mortmain.

First. Devises to charitable uses, unincorporated, equally lock up real property: but I agree, that, in a commercial country, the circulation of real property ought not to be too much checked; and to prevent it, the Constitution has deposited with the King, as a Royal Trustee for his people, the sole and exclusive right of making Corporations, and licensing alienations in mortmain to them.

The King, and not this Court, is intrusted to decide upon the propriety of such corporations and alienations: he will weigh the objections of throwing so much land out of commerce, with the advan-

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tages which may result to the public from the improvements such a College may make in an University education, and determine in this, as in every other measure of his government, by that supreme law (from whence he never departs) the good of his people.

And this brings me to the Objection of the application here being premature, and that the Officers of the Crown will be under a bias, and their judgment anticipated by the judgment of this Court upon the nature of the Trust; and that an incorporation cannot be refused after a Decree is made by this Court in favour of the Trust.

I think the application very properly timed, and that it would have been premature to have applied for a Charter before the validity of the Trust was settled in this Court. Suppose the reasons, which have been urged at the Bar, had been laid before the Crown against granting a Charter; the answer would have been, "We are not to determine the legality of trusts. To grant or refuse the incorporation on that ground is to determine a question *alieni fori*. That is a question for a contentious jurisdiction to determine between the parties who are interested in it."

A Court of Equity is only competent to such a question, where the parties may have the benefit of an appeal to the supreme Court of civil judicature.

Suppose the Crown had incorporated the College, and this Court afterwards said, it was a void illegal trust, and not fit to be executed: the King's Charter had been a nullity, and all the trouble and expence of getting it, idly thrown away. Suppose it had been refused, upon a supposition of the trust being illegal and void; the Crown would have acted upon a false ground (if the trust was not an illegal one), and the parties have been left without any redress.

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And therefore it is beginning right, to take the opinion of this Court, first upon the validity of the devise, and the nature of the trust, which must either prevent any application from being made to the Crown at all, in case the opinion of the Court is against the trust; or, by a decision in favour of the trust, disengage the Crown from any perplexity upon that question, and leave it to judge of the propriety of such an incorporation from the same reasons of policy, prudence, and convenience, as would guide and direct it, if the validity of the trust had never been questioned; and as they do in all other cases, where reasons, which will not reach the legality of the trust, may decide against it politically, and be sufficient to determine against making the incorporation, or granting a licence of alienation.

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As to the Officers of the Crown being biased, and their judgment anticipated by such a decree, I think their judgment will be very properly anticipated as to the legality of the trust; because it has been settled, where it ought to be settled, and can only be settled,—in this Court.

It will be so far from embarrassing them, that I think it will deliver them from an embarrassment, by removing a doubt, which might otherwise have mixed itself in the consideration of the propriety of such an incorporation.

The opinion of the Court, upon the nature of the trust, can go no further than a declaration, that, according to the rules adopted by this Court, in compelling the execution of trusts against heirs at law, they see nothing in the trust, which should induce them (proceeding in the ordinary course of administering justice) to refuse the execution of it.

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But the making of Corporations is part of the King's prerogative, where reasons of state-policy only are to direct and govern the measure. Courts of justice, whether legal or equitable, are bound down to rules, and precedents, and reasons, which have prevailed in similar cases.

And your Lordship, presiding in this Court, and deciding a question of *meum* and *tuum* between the University and Lady DOWNING, may think the reasons not sufficient to warrant a refusal of the execution of the trust, and yet give them weight in considering the propriety of making such an incorporation. And many cases may be put, where this Court must execute the trust, and yet the Crown would be very rightly advised to refuse incorporating the body which is to be the object of that trust.

Suppose a Trust created for Birmingham or Sheffield, if incorporated in three years. There is no legal objection to the trust: but as trade has flourished, and is more likely to flourish, whilst unincorporated than incorporated, the Crown might be very properly advised to refuse the incorporation.

Another difficulty then arises; Who is to apply to the Crown for the charter? Not Lady DOWNING, because it is her interest to oppose it.

It might be referred to the Master to appoint Trustees for that purpose, in the same manner as if no Trustees had even been appointed.

(a) Steward
v. Germyn.

And in Duke, Char. Uses, 79. (a) an estate was directed to be sold, without naming by whom, and the Commissioners appointed J. S. to sell the land, and—decreed his sale to be good; and upon appeal, the Decree was confirmed.

Perhaps

Perhaps the heirs at law might not be improperly introduced upon this occasion; and if the heirs at law were to succeed the trustees in every power which they were entitled to under the will, neither the University, nor Lady DOWNING, nor the Archbishops and Masters, could have any objection to seeing the heirs at law of the Donor substituted in the place of the trustees. Upon whom does the Trust so naturally devolve, or who so proper to guard and protect the Charity, as the blood of the person who gave it?

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It is my opinion, therefore, to declare the Will well proved, and in case a ROYAL CHARTER, with licence to take in mortmain, shall be obtained, that the trusts of the will ought to be performed, but as the Trustees are all dead, the Master to appoint five new Trustees, who are to apply for such Charter of incorporation and licence; and reserve all further directions till after the Master shall have made his Report of the event of such application.

The Opinion submitted upon the two first questions, if it be right, makes it a matter of great indifference to Lady DOWNING, what becomes of

The third Question; whether, supposing the Trusts illegal and void, or of such a nature as not fit to be carried into execution by a Court of Equity, this Court will apply the estate to some other charity *ejusdem generis*, and as near the Testator's intention, as the rules of law and equity will permit.

But as this question has been argued at the Bar, I shall mention very briefly what occurs upon it.

This Court has long made a distinction between superfluous Uses, and mistaken Charitable Uses.

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By mistaken, I mean such as are repugnant to that sound constitutional policy, which controuls the interest, wills, and wishes of individuals, when they clash with the interest and safety of the whole community.

Property, destined to superstitious Uses, is given by act of parliament to the King, to dispose of as he pleases; and it falls properly under the cognizance of a Court of Revenue.

But where property is given to mistaken charitable uses, this Court distinguishes between the charity and the use; and seeing a charitable bequest in the intention of the testator, they execute the intention, varying the use, as the King, who is the Curator of all charities, and the constitutional Trustee for the performance of them, pleases to direct and appoint.

If it were *res integra*, much might be said for the heir at law; because in every other case, if the testator's intention in specie cannot take place, the heir at law takes the estate. And as the motive inducing the disinherison in a charitable devise, is a passion for that particular charity which he has named, if that particular charity cannot take place, *cessante causa, cessaret effectus*.

The right of the heir at law seems to arise as naturally in this case as in any other; but instead of favouring him as in all other cases, the testator is made to disinherit him for a charity he never thought of; perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish. But this doctrine is now so fully settled, that it cannot be departed from; and the reason upon which it is founded, seems to be this:

The donation was considered as proceeding from a general principle of piety in the testator. Charity was an expiation of sin, and
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to be rewarded in another state; and therefore, if political reasons negatived the particular charity given, this Court thought the merits of the charity ought not to be lost to the Testator, nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a presumption, that the principle, which produced one charity, would have been equally active in producing another, in case the Testator had been told the particular charity he meditated could not take place. The Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious, would entitle him to the same reward.

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There is a law in the Digest, which seems to have furnished a hint for varying the destination of a donation to the public.

Digest. xxxiii. Tit. 2. De Ufu & Ufufr. Legatorum.

De Legato Civitati ad certum Ufum. 16.

Modestini, Lib. ix. Responforum.

“ Legatum civitati relictum est, ut ex redditibus quotannis in eâ civitate, memoriæ conservandæ defuncti gratiâ, spectaculum celebretur, quod illic celebrari non licet. Quæro quid de legato existimes? Modestinus respondit: Cum testator spectaculum edivoluerit in civitate, sed tale, quod ibi celebrari non licet, iniquum esse, hanc quantitatem, quam in spectaculum defunctus destinaverit, lucro hæredum cedere: Igitur adhibitis hæredibus & prioribus civitatis, inspiciendum est in quam rem converti debeat fideicommissum, ut memoria testatoris alio & licito genere celebretur.”

Vide etiam Scævolæ responsum in § sequenti.

It is plain they looked at the motive of the gift, the immortalizing the memory of the donor, which was the only future reward a Pagan

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could enjoy. For this law was made 100 years before Christianity was the religion of the Empire. The particular spectacle directed was only the means by which that future reward was to be secured. Any other spectacle would as effectually answer that purpose. They looked at the end and aim of that benefaction, and shaped the means in such a manner, as without any violation of the laws, might secure the attainment of it.

The reason, which animates the Law, applies as forcibly to a legacy given to a charitable use under the Christian dispensation.

I do not mean to cite all the Cases.

The case of Da Costa and De Pas was the last great Case which I have any account of: that was heard December 6, 1743, at Lincoln's-Inn Hall. It was a bequest of the interest of £. 1,200. for establishing a Jesuba, or assembly for reading the Jewish law. It was agreed that it was not a good legacy to the intent for which it was given; but whether it was void generally, or only to this particular intention; or whether it should devolve upon the Crown for its own use, or was to be applied to some other charity, was reserved for further argument. And upon 18 May 1754 (a), it was determined, that, as it was a charitable bequest in the intention of the Testator, though of such a nature as not proper to be established in this Court, yet it must be applied to some other charitable use, to be fixed by the Crown; and that it was not a superstitious use, given to the Crown for their own (b) benefit. And

(a) Ambler, 228.

(b) By the Decree on the original hearing of the Cause, the Court declared that the bequest was not good in law, and ought not to be decreed or established by the Court; but reserved the consideration whether such £. 1,200. ought to accrue to the residue of the personal estate, or be applied otherwise, and how. On the 18th May 1754, the Cause came on to be heard upon the special reservation in the said Decree, concerning the £. 1,200.; when the Court declared that the same ought not to accrue to the residue of the

And therefore, unless the Court is of opinion, that the Trust is totally void to all intents and purposes whatsoever, Lady DOWNING could not be entitled to the estate. For if the Court is only of opinion, that it is an improper charitable use, not fit to be carried into execution by this Court, the consequences to Lady DOWNING would be materially the same. She would be as much excluded by a charity to be fixed by the Crown, as by the charity directed by the Testator. And therefore, if the second question was with Lady DOWNING, yet unless the third question was with her too, her claim could not be supported.

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The Master of the Rolls having delivered his opinion to the same effect; and the Lord Chancellor having agreed with them both:

DECLARED their unanimous Opinion, that the Trusts of the Charity in question ought to be carried into execution, in case his Majesty shall be pleased to grant his Royal Charter to incorporate the College, and his Royal Licence for such incorporated College to take the devised premises in mortmain. (a)

the personal estate, but ought to be applied to some other charitable use, and that the appointment thereof belonged to the Crown; and recommended it to the Attorney General to apply to the King for a sign manual to dispose of the same. The King, by sign manual, appointed £. 1,000. part thereof, to the Governors and Guardians of the Foundling Hospital, for supplying a Preacher in their Chapel, and to instruct the children under their care in the Christian religion, and for other incidental expences attending the said Chapel. And on 6th August following, the Court directed payment of the said sum of £. 1,000. to Taylor White, the Treasurer of the Hospital. Reg. Lib. A. 1754. fol. 309.

(a) See the subsequent Proceedings in this Cause in 3 Vesey junior, 714, under the name of Attorney General v. Bowyer.

IN CHANCERY.

The Great Seal in Commission.

LORDS COMMISSIONERS,

Lord Chief Justice WILLES,

Sir SYDNEY STAFFORD SMYTHE,

Sir JOHN EARDLEY WILMOT.

Lady MANSELL, Widow of Sir EDWARD MANSELL, } PLAINTIFF.
 Deceased - - - - - }

Sir E. VAUGHAN MANSELL, Bart. & Ux. M. LANG- } DEFENDANTS.
 DON, and others - - - - - }

Hik 1757.

Lady Mansell
 against Sir
 E. Vaughan
 Mansell, and
 others:

ED. VAUGHAN, Esquire, by Will dated 30th November 1683, devised his estates to Sir EDWARD MANSELL and A. MANSELL, deceased, remainder to the use of EDWARD MANSELL, afterwards Sir EDWARD MANSELL, Baronet, father of the Plaintiff's late husband, and his heirs for ever.

Sir EDWARD MANSELL, father of the Plaintiff's husband, by Will 2d September 1717, devised his estates as follows: viz.—“ I give and
 “ devise all my lands, tenements, and hereditaments, to my Wife
 “ DOROTHY for ever; and that she shall be directed and govern-
 “ ed by JOHN VAUGHAN and MORGAN DAVIES, Esquires, and
 “ *their heirs*, in the management of her concerns, whom I constitute
 “ and appoint my Trustees of this my Will, to act for her *and my*
 “ *children's interest*, as hereafter mentioned: viz. after my said Wife's
 “ decease,

“ decease, I give, devise, and bequeath all my said lands, &c. (sub-
 “ ject to the legacies hereafter mentioned) to my son EDWARD
 “ MANSELL, for and during his natural life; and that he shall be
 “ capable, *with the consent of the said Trustees*, to settle a Jointure
 “ on the woman they agree to in writing he shall marry, and from
 “ and after his decease, to his first, second, and every other son, in
 “ strict settlement; remainder to my son RAWLEIGH MANSELL for
 “ life, and to his first, second, and every other son, in strict settle-
 “ ment. And my further Will is, that the said RAWLEIGH shall have,
 “ during my wife’s life, what she pleases to allow him, and after her
 “ decease, £. 80. per annum, free of all taxes, for his own life.”—
 He then gives various Legacies, and after making his wife sole Exe-
 cutrix, he adds, “ And for want of heirs male, accordingly as before-
 “ limited and expressed, then my Will is, that my said real estate, &c.
 “ shall be and enure to my four daughters and their heirs for ever,
 “ and for want of such issue, to the use and behoof of my right heirs
 “ for ever.”

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The Testator died in March 1720, and his widow DOROTHY, in September 1721.

Their son, the late Sir EDWARD MANSELL, was married to his first wife ANNE, at the date of his father’s Will in 1717; and she died in 1739.

The Trustees, VAUGHAN and DAVIES, were at that time both dead; VAUGHAN dying in 1722, and DAVIES in 1728. In October 1740, Sir EDWARD MANSELL married the Plaintiff.

The Bill stated, that the said Trustees, VAUGHAN and DAVIES, being both dead, so that their consent became impossible by the act of God; and the said Sir EDWARD MANSELL thinking it reasonable
to

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to make a provision for the Plaintiff, in case she should survive him, did, in consideration of, and previous to the marriage, by Lease and Release of the 30th and 31st October 1740, convey the estate in question to Trustees, &c. to the use of himself for life, remainder to the Plaintiff for life for her Jointure. He died 9th May 1754.

The Defendant Sir ED. VAUGHAN MANSELL, admitted the Will and other proceedings stated in the Bill, but said that the Plaintiff's late husband did at and long before his father's death, lead a very debauched life, and was at that time married to two wives, one of them LOUISA SMITH, a woman of a very vicious course of life, from whom he was separated, and had libelled for a Divorce; the other was ANNE, the widow of R. Phillips: and Defendant believed that the manner of life he led, and his imprudence in marriage, and apprehensions of future misconduct, were the reasons of his father's limiting the estate to him in so strict a manner, and of his annexing such strict conditions to his power of making a Jointure on any future wife he should marry; that though the Trustees were both dead, the eldest son and heir of MORGAN DAVIES, the survivor, was alive, and then of the age of forty years, and was never applied to for his consent; as Sir EDWARD must have been fully convinced that no person who had the least regard for him, would have consented to such marriage; in regard that the Plaintiff, long before her said marriage, was not only a woman of no family or fortune, but of ill fame; and also, that Sir EDWARD MANSELL was fraudulently prevailed upon to make such Settlement; inasmuch as the Plaintiff, or some person on her behalf, prevailed on him before the said marriage, to execute a Bond to her by the name of S. BAYLIS, spinster, for £.6000. notwithstanding no Consideration was paid.

The

The Defendant submitted therefore, that such Settlement was not duly made, being without the consent of the heir of the said MOR-
 CAN DAVIES, the survivor of the two Trustees; that he, being
 eldest son of the said RAWLEIGH MANSELL deceased, is Tenant in
 Tail under the Will of the said Sir EDWARD MANSELL the father,
 on the death of the Plaintiff's husband without issue, and also heir
 general of the family; and that as the Plaintiff's late husband inter-
 married with the Plaintiff, without the consent of the original Trus-
 tees, or the heir of the survivor, he had not any Power to limit the
 said premises in Jointure to the Plaintiff, such previous consent
 being, as he was advised, a condition precedent to the vesting
 of the said Power, and therefore, that the Settlement is absolutely
 void.

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Lord Commissioner WILMOT.

There are three Questions:

1st. What the Power devised is, whether a Power to make a Join-
 ture, with consent of VAUGHAN and DAVIES personally, or with their
 consent, whilst they lived, and, after their deaths, with consent of
 their Heirs? whether he intended to give the Heirs the same check
 and controul as he gave to VAUGHAN and DAVIES?

2d. If he did, whether this Intention can take place according
 to the rules of Law?

3d. In case the consent stops at VAUGHAN and DAVIES, and does
 not extend to their Heirs, whether the Power exists after their deaths;
 or in case it be determined at Law, whether a Court of Equity can
 set it up again?

The first Question is merely a question of Intention, which must be
 collected from the situation of the Testator and his family at the
 time

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time he made this Will, and from the words of the Will; for though evidence of intention, *dehors* the Will, is not admitted; yet facts and circumstances regarding the Testator and his family, have been always taken into consideration to explain and illustrate the words of a Will.

Sir EDWARD MANSELL had a wife, two sons, and four daughters: he was seised in fee of two estates; the MANSELL estate, £. 800. a year, rightfully; the VAUGHAN estate, £. 650. a year, or thereabouts, wrongfully; but, as he thought, rightfully.

In this situation, he makes a Settlement of all his estates by his Will. The first object of his care was his Wife; he gives the whole to her for life; he makes his Son to depend absolutely upon her whilst she lived; she is to maintain RAWLEIGH, and the unmarried Daughters: after her death, he gives £. 1,000. a-piece to the daughters, and £. 80. a year to RAWLEIGH; subject to these provisions, he gives the estate to his eldest son for life, who was at that time married very improvidently, and was supposed to have two wives alive at the same time: His father's displeasure was incurred. John Price swears his father was very angry on account of both the said marriages: however, his anger did not operate so far as to produce any disinherison of him or of his children; they were to inherit his Title, and therefore his Son's children, even by his then Wife, who had come into his Family without his consent, were to take the estate in a course of succession; but as to the Wife herself, he would not give him a Power of settling any thing upon her, even with the consent of his Trustees, however she might deserve it by any future behaviour. Then an event arises in his mind—the Wife might die, or perhaps a nearer event might be in his eye; which was a Divorce: suppose that should happen, what must he wish? If no children at all—that his

Son

Son should marry again, and have children for the continuance of his name and family. If he had children, he might wish he should marry again, rather than lead a dissolute profligate life, and strengthen the succession by having more children, provided he made a proper choice. He might wish he should rather not marry at all, than marry a common prostitute, a circumstance not in his power to prevent; he could not direct his choice, but if he chose improperly, he could prevent that person from having any interest in his estate; and by excluding his present wife from having any chance of a Jointure, he shews that the ruling passion of his disposition was, that no improper person should ever have any thing to do with any part of his estate. The Power of making a Jointure would enable him to marry properly and prudently; but if he was to exercise that power as he pleased, he might exercise it improperly and imprudently; from what had happened, he had no great reason to repose any confidence in him; and therefore, to give him a Power of making a Jointure as he pleased, was too great a Power. On the other hand, if he had no Power of making a Jointure at all, no Lady of fortune or family would marry him. He would not trust him with making a Jointure upon whom he pleased, nor absolutely tie him up from making a Jointure at all. He took the middle way, a Power of making a Jointure with consent of Trustees; it is a kind of delegation of his own authority. "If he marry a woman I like, I should be very willing to settle a Jointure upon her. If after my death, he marry a woman they approve, he shall have the same Power. This qualification will give all the good which such a Power can give, and at the same time guard against all the abuses of it. There will be no temptation for a profligate woman to entrap my Son, when there is nothing to be got by it. It will be

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a motive for a Lady of merit and fortune to make the alliance, when she sees a proper provision may be made for her. When my Son finds he can make no Jointure, unless the woman he proposes to marry is approved of by the Trustees, it is the most likely method I can take to make him look out for a Lady worthy of their approbation." Under these reflections, and in this view and prospect of the future marriage of his Son, he makes his Will. The Trustees expressly named in the Will, were at that time about sixty years of age, and the son's wife thirty. From that fact, the Counsel on both sides agree in contending, that the Testator did not intend to stop with the two Trustees, because it was between five and six to one, if alive when such a marriage happened; but from those premises they draw very different conclusions. The Counsel for the Plaintiff say, this is an evidence of the Testator's intention to make the consent only a temporary check in the exercise of this Power, and when consent could not be had, that the Power should be absolute. The Counsel for the Defendants insist, this is a reason for a liberal construction of the words of the Will; and that as he intended a check, he must have meant an effectual check, a check which was to be co-existent with the Power on which it waited, and that can only be by extending it to the Heirs of the Trustees. Now suppose he had been told at that time: "It is five to one but these Trustees, or one of them, die before your Son's wife dies. If that should happen, what do you intend in that event? That your Son should settle the whole £. 1,500. a year upon whom he pleases; or that he should have no Power of making a Jointure at all? or do you intend to give the Heirs of VAUGHAN and DAVIES the same controul over this Power, as you have given VAUGHAN and DAVIES, and that their consent should be necessary to the exercise of this Power?" I have no doubt but he would

would have chosen the check upon the power by the Heirs of VAUGHAN and DAVIES, because that is a provision which comes the nearest to his intention in giving the Power at all. It does not answer it fully and in every respect, because it is placing a confidence in persons he cannot certainly know; for the persons who are their heirs apparent at the making of the Will, may be dead, when this Power comes to be executed; but though the individuals are not certainly known, yet the stock from whence those individuals must come, are known and named; it is a Trust reposed in the Heads of those two Families, and it is the credit and general character of Families which often occasion individuals of such Families to be named as Trustees, when such individuals have been very young, and before they have given any visible proof or testimony of their own honour and virtue; it was not leaving it absolutely to chance to determine, there being a well grounded hope and expectation that persons allied to sense, and honour, and virtue, should inherit those qualities: it is all the security which can be had, and all the caution which can be taken for the performance of Trusts of duration. That Virtues are hereditary and run in the blood, many instances evidence the truth of such an assertion: though it is not so satisfactory as checking the Power with persons, whose judgment, sagacity, and discernment have been experienced by him, yet it falls in more with his intention to check it imperfectly, than not to check it at all. Whether such a Trust can be reposed in persons not certainly known, will be the point to be considered under the second question. He certainly intended to give a qualified Power in the first instance, during the lives of the Trustees; what reason can be assigned, why he should give an absolute Power, or no Power at all, when they were dead? The death

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of the Trustees could not mature his judgment, or affect the motive which induced him either to give the Power or to check it: to intend a check which in all probability would never take place, was as absurd, as to give a Power which could in all probability never take place: they were both equally out of his intention; he never severed the Power in his own mind from the qualification of it; they both together formed one complete idea in his mind; he must have intended that the Power and the qualification should live and die together, or to speak more accurately, that his Son should have this qualified Power as long as he lived.

To shew that this was his intention, I will examine whether he could intend to give the Power absolutely, if the Trustees died. Whilst the Trustees lived, they were not only to determine if any Jointure, but what that Jointure should be; for if they could give or withhold their consent at pleasure, they might certainly ascertain the *quantum* of the Jointure; so that, according to the circumstances of the Son, when his wife died, and of his having several children, few or many, they were to regulate their judgments in the execution of the confidence reposed in them. If he had many sons, and was become a very old man, they might not consent to his making any Jointure at all upon any woman. If to make a Jointure at all, the family, the fortune, and other circumstances, were to have regulated the *quantum*. But if the restraint was to fly off, and the Power to become absolute on the death of the Trustees, surely he would have given some directions as to the *quantum* of the Jointure, or the Fortune to be brought as an equivalent for it, or that most material circumstance, his having or not having sons by his first Wife. What a vast immense space there is between not trusting his Son to settle a shilling

shilling upon any woman whatsoever, proper or improper, without the consent of two Trustees, and leaving him at liberty to settle the whole £.1,500. a year upon whom he pleased; for take away the check, and he may settle the whole, and though the Plaintiff should be evicted, that makes no difference; it is to be considered, as if she had the whole of the estate.

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It is not possible to conceive that a man's imagination should step from one extreme to another, without any cause whatsoever, to make this alteration in his intention; there is a much less distance between giving a limited circumscribed Power, and no Power at all, than giving a limited Power and an absolute one.

Powers to make Settlements upon second Wives, where there are children by the first, are not always inserted in Settlements, and are often attended with great inconveniences to Families; but there never was such a thing heard of, as to give a Power of settling the whole family estate, without any restraint, upon a second Wife, even though there should be children by the first. It is not done where a Son marries with consent, much less where there was such an instance of his indiscretion: could the Testator ever intend to leave his Grandsons, or his second Son, or his Sons, who were to inherit the Title, without a single shilling, during the life of a woman without the least fortune or merit whatsoever?

But suppose the question had been put: "You cannot check this Power by the consent of the heirs of the Trustees; it is uncertain who they may be; they may be idiots, lunatics, infants, or such a number of heirs as may never consent; the Law will not endure such a disposition. You must either give him the Power absolutely, or not give it him at all, after the death of the Trustees. Two events may
happen;.

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happen ; your Son may reform, and be' disposed to marry a woman of virtue, family, and fortune. This Power will enable him to make such an alliance. He would probably answer, " But if he have
 " many children by his present wife, there is no occasion for his
 " marrying again at all : and if he has no children, and he should
 " marry again, he may choofe as improperly as he has done already ; whereas he may marry prudently if he has no such Power.
 " My Grandchildren and second Son cannot be hurt if he has no
 " such Power ; but if he has such a Power, they may be injured extremely by the abuse of it." The ruling passion of his mind was to guard against a profligate woman having any thing to do with his estate. He would not so much as let the woman he had married have a chance for one inch of his estate. In the state of mind he must then have been in, the very chance of a second improvident match, and the prospect of his Grandchildren, or his second Son, being postponed for the life of such a woman, must have turned the scale against giving a Power free from controul. Will the words of the Will bear this construction ? He gives the whole to his Wife, and then says, she shall be directed and governed by VAUGHAN and DAVIES, and their Heirs, in the management of her concerns, whom he constitutes and appoints Trustees of his Will, *to act for her and his children's interest as hereafter mentioned* ; then to his Son for life, and that he shall be capable, with consent of his said Trustees, to make a Jointure on the woman they agree he shall marry ; and who were to direct and govern his wife. The Trustees were VAUGHAN and DAVIES—was there any body else ? Their Heirs. If the Heirs of VAUGHAN and DAVIES were to direct and govern his wife, they were to be Trustees. What effect this nomination of Trustees would
 *
 have

have as to his Wife, is not the question. He thought gratitude, affection, and a deference to him, would incline her mind to comply with that injunction; and if he was providing for an event of their deaths, and substituting their Heirs to direct and govern his Wife, he was as old as the Trustees, *a fortiori* he must intend that provision to take place in respect of his children, who were so much younger than the Trustees and his Wife.

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is is the more enlarged and liberal construction of the Power, most for the benefit of the person to whom it is given; for if a Power is to be executed with the consent of a particular person, it cannot be executed after the death of that person, as will appear from the third Question, this is the most benign construction of the Will, and we must construe it now exactly in the same manner as if the Power had been executed with the consent of the Law of the Trustees, and the present Defendants had intended that the consent was confined personally to the Trustees, and as they were dead, that it could not now be executed at all. View the case in that light, and the Plaintiff's right would have been incontrovertible.

It is to be considered in the same manner as if he had said, "With consent of VAUGHAN and DAVIES, and their Heirs;" but if he had said so, then,

The second Question arises; viz. Whether that intention can take place according to the rules of Law?

It is not necessary to determine this Question. For, if the Testator intended they should consent, it shews he did not intend that the Power should be executable after the death of the Trustees without consent,

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consent, which is the great point of this Question, and in reality decides it. But, for my own part, I do not see any Rule of Law which encounters this Intention.

The Objections are; first, that it is absurd to place a confidence or trust in persons who are not known to the party who trusts them, because the motive of choice is the judgment and honour of the party trusted, which cannot be where the persons are unknown.

That Objection goes too far, for it strikes at all Authorities coupled with Interests. For, suppose estate to A. and his Heirs, upon Trust, to convey to such woman as B. shall marry with the consent of his Heirs; there the estate will draw the Trust along with it, and there is as much personal confidence put in the one case as in the other: nay, there is a greater, for if he should sell the estate for a valuable consideration to a Purchaser without notice, the estate is lost. It would be an objection against creating any Trusts, which would last longer than the lives of the persons trusted. There is a necessity for trusting persons who cannot be personally known, in order to effectuate men's intentions in the exercise of that dominion which the Law gives them over their properties. There is nothing absurd in trusting persons not known, nothing incongruous or repugnant to the rules of Law. If there was, the uniting an Authority with an Interest could not legitimate it, because it does not remove the Objection, which is, that I do not personally know whom I trust.

The Case in Moor 61. is directly in point, that a confidence or authority may be committed to persons who cannot be known to the party. Nothing can be more personal than the selling an estate, and disposing of the money for the good of the Testator's soul; and the instances there put, of a Sale by a person to be appointed by his
Wife,

Wife, by the right heirs of J. S. or by the mayor of London, prove the same position, even in case of a naked Authority.

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It is then objected, that this is a kind of Judicial Office, a *forum domesticum*. There is no certain rule that a Judicial Office cannot be granted in fee: that of Sheriff, which in some branches is a Judicial Office, may: the great Appellant Jurisdiction of this kingdom is hereditary; if it were improper, it would be much more so in the last resort than in the first.

Judicial Offices are grantable in Fee; viz. Ushers and Chamberlains of the Exchequer; Office of Warden of the Fleet, a great Trust, and yet grantable in Fee. Objected, that there may be no body to execute it till administration, which may be given to entire strangers, named by the Ordinary, or named by the party. Heirs are certain upon death of Ancestor, and must be of the blood of the person in whom it radically and primarily vested. But it cannot be compared to a Judicial Office: this is a mere single act to be done; to judge of the general character and fortune of the Lady: it does not require great skill and ability; one man is as good a judge as another; as to real merit and temper, and disposition, the wisest are generally the worst judges.

It is said, that a naked Authority will not survive, and therefore will not descend; that Peyton and Bury proves the principle. That Case does prove, and the Law is settled, that a naked Authority will not survive, though there is something very like a naked Authority that will survive, viz. Guardianship, 2 Peere Will. 103.—Lord Shaftsbury's Case—the slenderest interest coupled with it which can be conceived: an action may be brought for the Ward, but it is such an Interest as cannot be assigned or transmitted; and as this

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species

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species of Authority may survive, though it cannot be transmitted, an Authority may be transmitted which cannot survive; but where Office or Authority is given to two and the Survivor, then it will survive. This shews there is nothing in an Authority incompatible with its surviving, but only proves, that if I say, I will trust two, the Law will not say, I shall trust one: it is a joint confidence; but if it is limited to Survivor, it is saying, I will trust two as long as they live, and afterwards one of them. So, if a Power is given to A. the Law will not say, he shall trust his Heir; but if he should say, he will trust his Heir, there is as much reason to give that purpose an effect, as to trust one instead of two. The Case cited shews a man may trust persons he does not know; if nothing illegal, the intention ought to take place; it is not giving a surviving or descendible quality of a naked Authority; but it is a special designation and description of the persons to whom the Power is given upon the death of the persons expressly named. A personal estate has no descendible quality in it; it cannot be made to descend to an Heir at Law; but it may be given to an Heir at Law by a special description. Devise of personal estate to Heirs of A. good: or to A. and his Heirs during the life of B.: so a Power may be devised, with consent of the Heirs of A. It might be so given in the first instance; it may be given so eventually; and though given to Heirs of persons particularly named, yet it is the same as if, after their deaths, the Heirs of any other person had been named; and though in this Case they are named, as if intended to take by descent, yet it must take effect according to the legal operation; by descent, where it can, by special description, where it cannot, as in the estate *per autre vie*. It is then said, as it is clear it cannot survive, what must have become of it after the death

death of one of the Trustees? It must do as in all other cases where there can be no survivorship, and yet are words to shew it is not to determine, viz. take place in the persons substituted to act after the death of the persons named; it must be considered as a Tenancy in Common; or rather, in analogy to that species of estate, the same as if the Testator had said, with the consent of VAUGHAN and DAVIES, while they live; when one of them dies, his Heirs shall stand in his place, and concur with the surviving Trustee in the check; when both dead, the Heirs of both shall concur in the check. If he had said, their several and respective Heirs, it would have been clear; and in common parlance, and according to the common apprehensions of mankind, when an estate is given to two men and their Heirs, no man, not illumined with the legal notion of Jointenancy, could ever conceive the estate was to go to the Heirs of the Survivor. The Law depends upon particular reasons, which it is not necessary to consider in this Case; and even at Law, where the thing given is several in its nature, it shall operate severally, though the words are joint. A Corady to two men and their Heirs, is a several grant to each of them; for the persons be several, and the Corady is personal; Co. L. 190. a.: so here the persons are several, and the consent is personal: it is equivalent to saying, "With consent of both while they live, but when one die, that consent shall devolve upon his Heir: the Heir of the dead Trustee shall consent, as well as the surviving Trustee: one may abuse the Power; I will supply the loss of one by his Heirs, and the loss of both, by the Heirs of both."

It is then said, this Power may devolve on Infants, Idiots, or Lunatics, or such a number of female Heirs, as will make their agreement very improbable, and equivalent to a disability.

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1st. This is an objection to Authorities coupled with Interests, as well as to mere naked Authorities; the disability is the same, but it is no reason against the creating such a Power, that by an accident it cannot be exercised.

If the party expressly named becomes disabled, it introduces a suspension of the Power: as the death of the party would totally take it away, a temporary disability would suspend it; and how far this Court will act in such a case, is not necessary now to determine.

But suppose the consent was confined to VAUGHAN and DAVIES, then

The third Question arises, viz. Whether this Power can be executed, when this consent cannot be had; that is, whether the Power becomes absolute, or expires at their death; and if it expires, whether the Court will set it up again?

I will consider this as a mere legal question, uninfluenced by any apparent or declared intention either way. It is said, that the Power vests upon the Testator's death, and that whenever there is a vesting, whatever happens to defeat it afterwards is a condition subsequent; and if that becomes impossible by the act of God, that the estate or interest vested becomes absolute. Something does vest upon the Testator's death; a Power to be exercised *in futuro*, upon a precedent condition or a contingency; the same as vests in devisee of estates upon condition, not the estate itself, but a right to have the estate, when the condition is performed. Where an estate vests and is executed, it gives an immediate right to the rents and profits, which shall not be taken away by a condition becoming impossible; but all Powers are executory, and vest no estate in any body till they are executed.

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The Power itself is a mere incorporeal right, and whilst it remains incapable of being exercised, it is to every intent and purpose the same as if it did not exist at all; and wherever a fact is to happen, before it can be exercised, that fact must be in the nature of a condition precedent; whatever must happen before it can be executed, must precede it; the time of exercising the Power is the only point of time to be considered, whether the condition is precedent or subsequent. I have no idea of a condition subsequent to the execution of a Power. An estate, derived under the execution of a Power, may be defeasible by a condition subsequent.

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But before a Power starts from its state of inactivity, whilst it is incapable of being executed, it does not exist: when the event happens, and it exists, and is executed, there is an end of its existence, and no subsequent condition can unexecute the Power, and determine the existence of what does not exist. The Trustees approbation is a condition precedent to the existence of this Power. His appointment without their approbation, is as ineffectual as their approbation without his appointment. They must both concur to the animation of this Jointure: he can no more execute this Power after they are dead, than he can whilst they live and withhold their consent.

It has been said, that the execution of this Power divests nothing. It postpones the remainder: It turns a remainder expectant upon one life, into a remainder expectant upon two: It not only removes the chance of the enjoyment a life back, but it suspends the power of acquiring the absolute dominion of the estate by a Recovery.

It has been said, the words, "if living," must be added. If they were, they would not vary the case; at least they would vary it no more than what is expressed; they cannot consent, if they are not alive. But

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there are more material words to be added, viz. "That after their
" deaths, his Son should have a Power of appointing a Jointure, with-
" out the consent of any body;" that is, the Testator has given a Power
to be executed in one event, and, because it cannot be executed in the
manner he intended, therefore we must give him a Power, from con-
jecture, which we do not know whether he intended or no, and which
we must presume he did not intend, as he has not said it. This would
not be expounding a Will, but making a Will; it is not like Coryton
and Hilliard, where the words were equivalent to, *if so long live (a.)*

(a) Coryton and Hilliard, 10th August 1745, from Sir Eardley's MS. Notes.

Sir William Coryton devised all and singular his manors and lands unto his Wife Sarah, Sir Edward Littleton, and others, and their Heirs, determinable as hereafter declared, upon the several Trusts hereinafter mentioned, viz. until his Son John Coryton, Esquire, attained his age of twenty-seven years, and no longer; in Trust, in the mean time, out of the rents and profits, to discharge the legacies and sums of money mentioned in his Will, and after payment thereof, to lay out the remaining money at interest, upon the same Trusts as his lands are settled; and after the determination of the estate limited to them in Use or in Trust as aforesaid, and the accomplishment of his Son's age of twenty-seven years, to the use of the Trustees and their Heirs, that they should stand seised to the use of them and their Heirs, to the use of his Son John and his Assigns, for the term of ninety-nine years, *sans* waste, and from and after the determination of that estate, to the use of the said Trustees, during the life of his said Son John, to preserve, &c.; and from and after the death of his said Son John, then to the use of his first and other Sons in Tail, with other Remainders over.

John Coryton the Son died, having made his Will, and devised all his personal estate to his Wife, who claimed the ninety-nine years as a term in gross.

The Question in this Cause was, Whether, on the construction of this Will, John Coryton, the Son, took an absolute estate in the term, or whether only for his life?

Lord Chancellor said,

There are two Questions; First, Whether these are limitations of a Trust, or of a legal estate? Secondly, Whether the term of ninety-nine years is now subsisting as a term in gross, or is attendant on the inheritance?

As to the first Question, Lord Chancellor was of opinion it was a Trust and not a Use, after the arrival of John Coryton to his age of twenty-seven years.

As to the second point, he held it determinable on the death of Sir John Coryton.

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Uvedale and Halfpenny, 2 P. Will. 151. was a plain apparent mistake. All these kind of affirmative Powers, imply a negative; viz. if they are not executed with consent, they shall not be executed at all.

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Powers of Revocation are often given in Marriage Settlements, with consent of Trustees; but it was never apprehended that when the Trustees were dead, the Tenant for life might revoke all the uses of the Settlement. It is in the power of the giver to modify his gift as he pleases, and the donee must take it as it is given him; and if he cannot have it in that manner, he cannot have it at all.

The qualification of this Power, being a consent to a Marriage, is looked upon with an unfavourable eye, and rather throws a mist about this point, which another kind of qualification would not have done; for suppose it had been to make Leases with consent of A. to such persons as A. shall approve, or if A. comes from Rome, or any other collateral event, it would not have endured a moment's litigation.

It has been said, Powers must be literally construed, and the Cases adduced are very proper to support that position; but in all these Cases a Power has clearly existed; whereas the question here is, whether there is such a Power or not. Cro. Elizab. 26. Lee v. Vincent, is in point—state it.—Estate cannot be sold after the death of A. In 1 Leo. 286. is a case of the same kind. Lands to be sold after an Estate Tail, with the assent of A. who dies, the Power is gone; and yet very improbable A. should survive the Estate Tail.

But the true way of considering this question is, to take it as a description and designation to take. All Powers arise out of the old Fee, and, when executed, operate by the Statute of Uses, and are equivalent to a limitation inserted in the Deed containing the Power; the party is in by the giver of the Power: the same as if devised to

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Son for life, remainder to such woman as he shall marry with the consent of A. and B. She must bring herself within the description, in order to take. Suppose a Power to make Jointures upon any of the Daughters of a particular person, and that person never has any Daughters, or they all die, or upon a Peeress. The case in Dyer, 189, b. Butler and Bray, is in point upon this part of the case, and though obscurely reported, yet the substance is plain; and in Godbolt, 77, Bonefant v. Sir R. Greinfeld, it is cited in this manner: Lord Bray covenanted, that if his Son marry with the consent of four Lords, whom he especially names, A. B. C. D. that then he would stand seised to the use of his Son and his Wife, and of the Heirs of their two bodies begotten; one of the four was attainted and executed; the others consented he should marry such a one. He married her, yet no estate passed, because the fourth did not consent, and it was a joint Trust. In 1 Leon. 74. Baldwin and Cock, it is cited again, and said to be adjusted, that upon that Marriage no use shall accrue.

It has been argued from Intent, and said, that comparing ages of Trustees with the Wife's age, it was five to one if they survived her; and therefore that he could not intend to give a Power with a restraint which would probably defeat it.

The Testator was the proper judge of the propriety of such a disposition: he knew the Wife's age, and the ages of the Trustees: he might not have given his Son any Power at all: he saw the improbability of the Power taking place. If he had thought proper to have given the Power without any restraint, in case the Trustees died, he would have said so.

Suppose it had been given with the consent of one Trustee who had been younger than the son's wife, yet he might have died before her; and the Testator must be supposed to have taken that event
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into his consideration; and whether it is more or less likely that the contingency shall happen is not material: he might have given him no Power; he might have given it him upon an event where it was two to one, or a hundred to one, whether that event should happen: "*expressio unius est exclusio alterius*;" the giving it in one event, is saying he shall not have it in any other.

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It would be most absurd to say, he had given it on a contingency, and yet that he should have it, whether the contingency happened or not; the giving it on a contingency, is equivalent to saying, he shall not have it unless the contingency happens.

The other Lords Commissioners being of the same Opinion;

DECREE, That the Plaintiff's Bill, so far as it seeks Relief concerning the MANSELL Estate, do stand dismissed out of this Court without Costs, and that possession of the MANSELL Estate be delivered to the Defendant Sir EDWARD VAUGHAN MANSELL; and Order, that the Plaintiff do deliver to the said Defendant, upon oath, all deeds and writings in her custody or power relative to the said MANSELL Estate.

OPINIONS AND JUDGMENTS, BY

IN CHANCERY.

The Great Seal in Commission.

LORDS COMMISSIONERS,

Lord Chief Justice WILLES,

Sir SYDNEY STAFFORD SMYTHE,

Sir JOHN EARDLEY WILMOT.

REHEARING:

HENRY TOYE BRIDGEMAN, Esquire - - - - - PLAINTIFF.

GEORGE GREEN and MARY his Wife, THOMAS GREEN, } DEFENDANTS.
WILLIAM LOCK, and WILLIAM LOCK, Junior - - - }

2 D. G. B.

AND,

GEORGE GREEN - - - - - PLAINTIFF.

HENRY TOYE BRIDGEMAN - - - - - DEFENDANT.

12 Deav.
4. J. J. Ch.
June 1757.Bridgeman
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15 Deav. 2.

THE substance of the original Bill was, that in 1746, the Plaintiff hired the Defendant GEORGE GREEN, as a Butler; that the Defendant having served him a short time, took advantage of the weakness of his understanding, and obtained a Bond from him for £.2,800. conditioned for paying him an Annuity, if his wages were not paid, or if the Plaintiff turned him out of his service; that he received his rents, and never accounted for them; that he introduced the Defendant WILLIAM LOCK to him, and they together got him to execute conveyances of various forms; that Defendant GEORGE GREEN proposed to him to mortgage his estate to EDWARD BRIDGES, Esquire,

quire, for £. 5,000. which he did, and received the money in Bank notes; but did not keep any of them, being told by WILLIAM LOCK, that he must indorse his name, which he did, and delivered them to GEORGE GREEN, WILLIAM LOCK, and THOMAS GREEN; that the Plaintiff had applied to them for an Account, which they refused. The Bill therefore prayed for an Injunction, and for general Relief.

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The Defendant GEORGE GREEN, by his Answer admitted, that he came into the Plaintiff's service in 1746, and that in six months he gave the Defendant a note of hand for £. 300. and afterwards executed the Bond as stated in the Bill; that the Plaintiff having no children, conceived a high opinion of him, and told him and others, that he meant to make him his heir, and give him his estate; that he proposed to raise £. 4,000. to give to him the Defendant; and that afterwards, conceiving a friendship for Mr. LOCK's son, he proposed to raise another £. 1,000. for him; admits that he received £. 2,600. for his own use, £. 1,000. in trust for his brother, and that LOCK received another £. 1,000. for his son. He admits the rest of the transaction, except that he denies that he used any means to gain an undue influence over him, and that he at all times appeared to be a gentleman of good understanding, and capable of managing his own affairs, and that he was not imposed upon or deceived by him.

THOMAS GREEN, by his Answer, says, that the Plaintiff often expressed the great regard he had for his brother. WILLIAM LOCK says, by his Answer, that he was employed by the Plaintiff, in September 1750, to draw some Deeds, which he did, and which were executed by the Plaintiff; and confirms the other part of the account.

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These Causes coming on before the Lord Chancellor Hardwicke, he declared that the sum of £.5,000. was obtained from the Plaintiff without any Consideration, and by undue influence and imposition.

On a Rehearing before the Lords Commissioners:

Lord Commissioner WILMOT.

There are two Questions in this Cause:

1st. If this money was obtained from the Plaintiff by undue influence and imposition?

2d. If Lock ought to be liable to pay any part of the Costs of the Cross Bill, to which he is not a Party?

The first is a question of fact, depending upon evidence read in the Cause, and a more powerful and unerring kind of evidence arising from the whole transaction taken together, from the particular relation there is between an Attorney and his Client, and the duty that relation laid LOCK under to BRIDGEMAN.

It was truly said at the Bar, that if the Decree proceed upon a principle of taking away that power which the Law gives every man over his own property, it ought to be reversed: and most certainly it ought; for our Laws, very unfortunately for the owners, leave them at liberty to dissipate their fortunes as they please, to the ruin of themselves and their families. The Roman Laws drew a line between liberality and profusion; they very wisely for the public, and very kindly for the parties, considered immoderate extravagance—"inconsulta largitio"—as a distemper of the mind, and treated a "prodigus," as a madman: they said, "expedit rei-publicæ nequis sua re male utatur." They thought it safer for the public, as well as kinder to individuals, to lay by their estates, whilst they were under the tyranny of their passions, and reserve them

for their use, when under the direction of their reason. But our Laws strike no such boundary; “*stat pro ratione voluntas*,” is the Law with us; every man may give a part, or all of his fortune to the most worthless object in the creation; and this Court never did, nor ever will rescind or annul donations merely because they are improvident, and such as a wise man would not have made, or a man of very nice honour would not have accepted: nor will this Court measure the degrees of understanding, and say, that a weak man, provided he is out of the reach of a Commission, may not give, as well as a wise man. But though this Court disclaims any such Jurisdiction, yet where a gift is immoderate, bears no proportion to the circumstances of the giver; “*ubi modus non adhibetur, ubi non refertur ad facultates*,” where no reason at all appears, or the reason given is falsified, and proved to be a fiction, and the giver is a weak man, of a facile easy temper, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct and behaviour of the persons in whose favour it is made: if it see that any arts or stratagems, or any undue means have been used by them to procure such a gift; if it see the least speck of Imposition at the bottom, or that the Donor is in such a situation with respect to the Donee, as may naturally give him an undue influence over him, if there be the least scintilla of fraud; in such a case, this Court will and ought to interpose; and by the exertion of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident to property, that it acts upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

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Take the Case on great outlines: A Gentleman, of £. 800. or £. 1,000. a year, with no ready money, and £. 1,000. in debt, mortgages part of his estate for £. 5,000. gives £. 2,600. to a man who came into his family five or six years before, as a footman, £. 400. to his wife, £. 1,000. to the footman's brother, £. 1,000. to the son of the Attorney who procured the money, and was introduced by the footman, besides 100 guineas procuration, and £. 123. for his Bill. What! give away the fifth part of all he had in the world, without any apparent motive whatsoever? no extraordinary services, no peculiar good offices, no visible spring from whence such a stream of bounty could flow. It must alarm and raise jealousies and suspicions in every man's mind who hears of it; for though, as Lock told Floyer, every Gentleman may do what he will with his own, yet people never dispose of their own without some motive for doing it. I do not say the validity of a gift is to depend upon the relevancy or utility of the motive producing it; but still there is some motive which impels the will of the Donor in every gift; and in the disquisition which the mind makes after the motive of an extraordinary and unusual gift, if it cannot find a good one, it is apt to suggest a criminal one, which has been done in the present case; and if it can find none, I defy any man, who watches the operation of his own mind, from concluding that some foul play has been used in obtaining it. Here, the criminal motive, it is agreed on both sides, must be laid quite out of the Case, because there is not the least tittle of evidence about it; if there had, I should have thought it a very strong circumstance for the Plaintiff: for this Court proceeding upon principles regarding the safety and utility of the Public, would refuse or give Relief,

He, not according to the merit or demerit of the party applying, but as was most likely, to prevent such a horrid commerce; and if men were not suffered to retain the wages of sin, it would be most likely to remove one great temptation to the inferior part of mankind, and to prevent them from submitting to such execrable prostitution; and I should not think a man a very free agent, when the party to whom he gives, has a halter about his neck; but as that motive must be quite expunged out of the consideration of this Case, there is no motive at all suggested, but that of reconciling the husband and wife (which is proved to be false) and general affection taken up for a Servant. Now affection alone, even the strongest, which is natural affection, works no such effects. Parents upon marriage of Children, or for their advancement in the world, or for some particular reason, will give liberally to their Children: Masters often provide a support and maintenance for Servants, during their lives; but Parents very seldom extend their bounty so far as to mortgage their estates for a fifth part of what they are worth, and give it a Child wantonly for no reason whatsoever, but to make him independent of them; much less will affection alone operate in the case of a Servant, so as to produce such an immoderate and unusual largess from a Master; and in all questions arising upon fraud and imposition in obtaining bounties from weak men, the propriety of the act done will always fortify it; the seeing a cause which might naturally give a being to such a bounty, speaks strongly in favour of it; and on the other hand, the impropriety of the act done, and the high improbability that the cause assigned should produce such an effect, will always bear a strong testimony against it, and at least force the mind to give a very favourable reception to any evidence of fraud and imposition in obtaining it;

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it; and therefore in the present Case, if an annuity of £.20. £.30. or £.40. a year, had been given GREEN for his life, or the sum of £.500. or some such sum, had been given him, considering the man, his situation, his understanding, and his circumstances, there would have been nothing in the act itself which had impeached it; but when the gift bears no proportion to the situation of the giver, to his rank in life, and to his circumstances, and no cause is shewn which, according to the constitution of human nature, and the common and ordinary operations of mere love and esteem, might naturally beget such a bounty, it carries its own death-wound, as Lord Hobart calls it, along with it, and proclaims itself upon view, to be the offspring of fraud and imposition. But it is worse here; for by the Cross Bill, the esteem and regard is said to be founded upon GREEN's having been a means of reconciling Mr. BRIDGEMAN and his wife; whereas he is proved in the Cause to have been the means of parting them.

Having said thus much upon the outside of the transaction, as it strikes me upon the first view of it, I will now consider the several parts of it.

The Decree is, that the £.5,000. was obtained from the Plaintiff, and divided between GREEN and his wife, and GREEN's brother, and LOCK the father, without any Consideration, and by undue influence and imposition on the Plaintiff, and therefore the real question is, was it obtained by undue influence or imposition, or not? and as to the restitution of the money, independently of the consideration of Costs, it seems to me to be quite immaterial from which of them the undue influence and imposition came.

There is no pretence that GREEN's brother, or his wife, was party to any imposition, or had any due or undue influence over the Plaintiff;

Plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the Equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it; and therefore supposing LOCK's conduct quite unexceptionable, though I think I shall shew it to be extremely criminal, yet if LOCK took this money under the undue influence and imposition of GREEN, he has no more right to keep it than GREEN's wife or brother had; and therefore, so far as the admittance of the undue influence and imposition, by not appealing from the Decree, goes, it reaches the whole £. 5,000. and makes no distinction between the money received by LOCK, and the money received by GREEN, his wife, and brother.

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The Counsel for LOCK have felt the weight of this Decree, unappealed from, so sensibly, that they have frequently endeavoured to engage our attention to keep the Cases of LOCK and GREEN quite distinct, and to deprecate our mixing them together; but that is the very point of the Cause, viz. whether the Evidence does not shew a combination and a union between them two to plunder the Plaintiff; and most certainly LOCK is not concluded by GREEN's not appealing from the Decree. He may say, as his Counsel have done at the Bar, that it was a bounty from the Plaintiff to GREEN, the result merely of his own benevolence to him, without any undue influence or imposition; or if there were any, yet that he stands quite detached from GREEN; that there was no combination between them, that

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he has done no more than a good Father ought to do, viz. received a bounty for his Son, from a man who might have given him all his estate if he had pleased. Now as to the undue influence and imposition of GREEN, the strength of the evidence is, that the Plaintiff was a weak man, and easy to be imposed upon, and that GREEN had a very great influence over him. It is in proof, that he brought his Master's purse into the hall, and said he was master of that, and should soon be master of him. Was this an undue influence; and how did he gain this influence over him? If by false suggestions and misrepresentations, it was unduly gained; and if unduly gained, it was an undue influence: a more wicked and more detestable mode of acquiring influence cannot well be suggested. In May 1745, Mr. BRIDGEMAN marries a Lady with 7 or £. 8,000. paid down, and £. 22,000. more in her own disposal: they live very fondly and affectionately together, till this footman comes into the family, which was in the end of June 1746, at £. 6. a year wages; he is not contented with getting 3 or £. 400. of his Master in 1747; in April 1748, he goes with him to Kidderminster, and makes him resolve not to live with his wife any longer; charges her with infidelity and disloyalty to his bed, with a servant, one Stone: when they returned and went to Clifton, he declared his master should go away with him, and actually did take him from her; and, lest he should have sense enough to see through the lie, or love enough to forgive it, when he had roused his jealousy, he endeavours to raise an aversion; traduces and vilifies her person, calls her nasty, ugly, stinking, old-fashioned, &c.—dissuades him from having any personal intercourse with her; advised him not to live with her, unless she would unstring her purse and give him £. 1,500. and then repents of even qualifying his advice.

advice. In 1749, when Savage was sent with a letter to the Plaintiff, and ordered to tell him, that if he would turn GREEN away, and come back with him, she would give him £.20,000; this man's ascendancy was so great, that he dissuaded him from it, and said, "Damn her and her fortune together." There are many other instances of his ascendancy over him; but if he could prevail upon him to violate his duty to his wife, and to prefer his footman to her and £.20,000. into the bargain, surely there is something more than a spark of undue influence in it. The relation between them was inverted, and he appears to be quite in a state of vassalage to GREEN. What difference is there between gaining a sum of money from a weak man, by false suggestions; and gaining the affection of the giver by false suggestions, which affection produces the gift? the gift is bottomed upon falsehood in one case as well as in the other; and in such cases as these, the influence is exerted, and the imposition must always be carried on, secretly and privately: it is almost impossible ever to adduce Evidence which applies directly to the act itself.

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The first instance of meddling with any part of the real estate, was about Michaelmas 1749, when GREEN was to be qualified to sport: that appears to have been a sham qualification; for though possession appears to have been formally given, and it had the appearance of a livery "by twig and turf, and the key," yet the rents were paid exactly as they were before; and when the estate was sold, GREEN was never made a party to the Conveyance, nor set up any title to it; and it does not appear from the Evidence, that the Plaintiff did execute any conveyance at all; and according to Edward Whitehead's account of that transaction, it was conducted so awkwardly, as might very naturally make GREEN think it was high time to call in some

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legal assistance for getting any part of the real estate; for Edward Whitehead swears that when, some weeks after the livery, &c. he was called into the Music-room to be a Witness, the parchment was signed by GREEN; and that some time afterwards he was fetched in again by GREEN, and that the Plaintiff brought out the same purchase Deed, and said he had sent for him to see GREEN's name cut out, which was then done and flung into the fire. This strange execution of the purpose aimed at, which was getting £. 100. a year, must have alarmed GREEN, and determined him not to venture upon his own or the Plaintiff's judgment; but to have somebody employed, whom, as he said to Loveday, he could trust *to do his business for him*.

And now LOCK comes upon the stage. Who is LOCK? Why, an Attorney, and a Landlord of a Public House at Farringdon, forty miles from BRIDGEMAN. Did he know him, or had he ever experienced his ability or fidelity? No. It does not appear he ever heard of him in his life before. Who introduced him; and how came he to be employed? GREEN introduced him. Loveday proves, out of GREEN's own mouth, the reason why the Attornies of the family were not employed, and why LOCK was—because he could not trust Barow or Jones; that he had found an honest Attorney, Mr. LOCK, *to do his business*. What was it he could not trust to Barow and Jones? not, the preparing a Conveyance;—they were much more likely to prepare it properly than an Innkeeper:—he could not depend on their concurring and assisting in the completion of such a self-evident piece of imposition: he knew that they would take care of BRIDGEMAN, who was their Client, and would guard him against imposition, and not do GREEN's *business*, which was to carry it into execution.

execution. It is said he did not employ Barow or any neighbouring Attornies, because he wished to keep it a secret. But if that was a motive, why fall upon a man GREEN knew, and who had been concerned for him? why not an entire stranger? If he meant nothing but what was fair, he was the only man in the kingdom who should not have been employed: besides, if that had been the motive, who was more likely to keep it a secret? An Attorney of great honour, worth, and ability, a neighbour concerned for him before; or a man he never heard of in his life, to whose honour, abilities, and taciturnity he was an entire stranger? a man engaged in a way of life where a secret is the least likely to be kept, unless his own interest engages him to keep it? GREEN's reason therefore for calling in LOCK, appears clearly to have been a conviction that Barow and Jones would not do what LOCK would. When LOCK came to BRIDGEMAN, and was informed what he was to do, that he was to convey £. 160. a year to the man who fetched him, in fee: What was his duty to have done? why, to have remonstrated, or at least, with modesty and humility, to have inquired into the principles and motives of such a wild immoderate act. A man of nice honour would have said in a moment, "As I am an entire stranger to you and your circumstances, and there is something so very extraordinary and uncommon in what you propose to do, I will not be concerned in it upon any account whatsoever:" but there is not an Attorney in the kingdom of common honesty, or who is desirous of appearing to have common honesty, who would not have paused upon receiving such orders; who would not have thrown an eye of doubt upon the directions, and have talked very explicitly both to the Master and Servant about it. He would at least have protracted the execution

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tion of such an extravagant purpose; he would have given time for deliberation; if he received no satisfaction from them, he would have taken some opportunity of inquiring in the neighbourhood, into the character of this Gentleman and his Servant, and what the opinion of the neighbourhood was about them: but instead of proceeding in this manner, Lock finishes the affair in five days; he never asks a single question, but only what he should insert as the Consideration of the Conveyance; and though it is not quite clear that Lock was at ^{Brinkmarsh}~~Brinkmarsh~~ on the 15th September, when the Letter was dated, or that he was present when it was written, yet it is very probable he was. He says, by his answer, that he came on or about the 14th, and staid there about two days; but whether there or not, as he had received directions from the Plaintiff himself, the Letter could be written for no other purpose, but to furnish him with a piece of evidence to justify his own conduct (a). It shews that he thought such a transaction as this could not pass unnoticed by mankind, and that no man could believe he ever received such directions, unless he could shew them in writing; and to me, this Letter is rather an instance of his cunning, in gilding the transaction and planning a defence for himself, than a proof of his innocence in it.

In cases of Forgery, Instructions under the hand of the person whose Deed or Will is supposed to be forged, to the same effect as

(a) Lock, by his Answer, stated, that he came to ^{Brinkmarsh}~~Brinkmarsh~~ on the 14th September, and that after receiving parol Instructions for the Conveyance, he desired the Plaintiff to reduce the Instructions to writing, and to mention what sum he would have inserted as the Consideration. He then added (without stating when he left ~~Brinkmarsh~~) that the Plaintiff wrote a Letter, dated the 15th September, and sent it to the Defendant at Farringdon; and that the Plaintiff thereby directed him to prepare the Conveyance, and to insert 3,500 l. as the Consideration.

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the Deed or Will, are very material; but in cases of undue Influence and Imposition, they prove nothing; for the same power which produces one produces the other; and therefore, instead of removing such an imputation, it is rather an additional evidence of it.

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The Combination is evidenced very clearly to me from Lock's conduct upon the first interview in preparing these Deeds; and if it was to be a Gift, why did he disguise it and bring it forth as a Purchase, *bond fide*, for a valuable consideration? Here is one great badge of imposition—"aliud simulatum, aliud actum."—Here he was concurring in an imposition upon mankind in general; here he was lending his aid and name by witnessing the Receipt to obtrude a Gift upon the world as a Purchase. This shews he dealt in masks and disguises. If Creditors attacked him, it was to be a Purchase, *bond fide*, for a valuable Consideration; if necessary to set it up as a Gift, and the Attorney is asked, "How came you, when you knew it was only a Gift, to give it the air of a Purchase?" then the Letter is to be produced, to shew that his Client had directed him to do so; and therefore, if the Parties had stood here, and the Bill had been brought to set aside these Conveyances, I should have thought the falsity of these Conveyances a strong evidence of the Imposition, and that Lock had been a party to it, and was used as an instrument by GREEN in completing it; but in less than a month, there is a change of intention, and £. 4,000. is to be borrowed by Lock. What had occasioned this change of intention does not appear; it must have been suggested by somebody, that as money has no ear-mark, it is very difficult to pursue it: Lands are visible and accessible; Conveyances are more easily set aside, and restitution of Lands is easy. Whether any advice was taken on these Deeds; or upon consideration,

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tion, LOCK might entertain some doubt about the validity of the Deeds ; or might wish to open a new scene, in hopes of getting some plunder himself ; whatever was the reason, LOCK is employed by BRIDGEMAN to get him £.4,000. The Mortgage was some time depending ; doubts and difficulties arise ; Deeds are wanted. In the course of this negotiation, BRIDGEMAN contracts a great regard for LOCK's Son, and will give him £.1,000. Was this true ? It does not appear that he ever saw the boy in his life before the £.1,000. was paid to the father for him. There is not the least tittle of Evidence in the whole course of the Cause, to verify that part of the Answer ; and therefore we must take it to be all a fiction, so that the motives suggested in support of the Gifts are both false ; the one is proved so, and the other is not proved at all : but if it had been true, would this Court endure, that an Attorney, who is borrowing money for a Client, should, pending the negotiation, receive either for himself, or any of his family, such an immoderate and extravagant bounty as this is ? If it should, there is an end of the Statutes of Usury, and of all that care which the Legislature has taken to prevent men, who borrow money, from being plundered by exorbitant Procuration.

This Court will not let an Attorney take a Security from his Client, pending a Suit, for a shilling ; and yet, in many cases, it is impossible for a man to attain his right without some such allurements to induce an Attorney to be concerned for him. If he fail in the Suit, he can never be paid, and therefore it seems reasonable he should stipulate for some certain extraordinary advantage in case he succeed : but the Court says he shall have nothing but his fees. The relation between them, and the power which his situation gives him over his Client,

Client, makes it impossible to distinguish between free agency and undue influence and imposition; and therefore, in such a state, an Attorney shall not take at all. Marriage brocage Bonds, Bonds to lewd Women from Heirs apparent upon contingencies—this Court sees the Parties in a situation so liable to be unduly influenced and imposed upon, that it will presume they were so, and admit no proof to the contrary.

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The giving money to the Son, and especially as it is not proved he ever saw him in his life, evidences the imposition more strongly than if given to himself. The plain reason was, to have made himself an Evidence in support of the Gift, and to enable him to call upon this Court for their protection of his Son, as an Infant. I consider it as a Gift to the Father; and nothing appears to have been ever done to declare the Trust for the Son. But if it was given to the Son, we cannot execute the Trust reposed in us for his benefit more faithfully, than by throwing such a poisonous weed out of his Fortune: and it is very observable, that a false colour is given even for borrowing this money. Jones swears that the Plaintiff told him, in Lock's presence, that he did not take up the money as wanting it then immediately, but as he was going abroad, and should want money to lodge in his Banker's hands, to answer his Drafts; and the Plaintiff was amused with thoughts of going abroad. Jeffrys was to instruct GREEN in French and Latin, and did give him two or three Lessons; and this delusion was kept on foot till after the Notes were given, and just before the Mortgage was executed: for Jeffrys was not dismissed till the 19th April 1751, and the Notes were given the March before, and the Mortgage executed the 21st April 1751; and even at the execution of the Mortgage, Stevens swears that

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BRIDGEMAN said he intended going abroad, and wanted the money to lodge in his Banker's hands; so that Lock, at the Spring Assizes 1751, and at the execution of the Mortgage, when the Plaintiff tells Mr. Jones why he borrowed the money, sits by, and as far as silence goes, abetted what he knew to be false, because he had at that time drawn the Notes for the disposing of the whole £. 5,000; and when Floyer asked Lock about it, on 4th September 1751, Lock tells him he knew nothing of it, and that he was not concerned in it. Here is disguise, artifice, false colouring, and low, dirty, shallow cunning, from one end to the other. But the taking the Notes to Lock's Son, is a decisive mark of imposition. GREEN had given up his Deeds; the Notes were substituted in their place, and therefore there might be some colour for taking them to GREEN and his Brother; but what pretence for taking a Note for £. 1,000. to Lock's Son? He ought not, especially whilst the Mortgage was depending, to have endured the very intimation of such a bounty. But to dare to take a Security for it; to draw it with his own hand, and such a Security—a Note for value received, (which was false) so as at the end of a month, Lock might lay him in Gaol, whether he had the money or not, (and if these Notes had been indorsed, there would have been no Relief against them at Law or in Equity) was such an abuse of that Trust which subsists between an Attorney and his Client, as without any other circumstance of Fraud whatsoever in the Case, would have satisfied me in decreeing a restitution of the money paid upon Notes so obtained.

There had been a scheme laid for going abroad, or at least a pretence of that kind, and carried on so far in earnest, that Jeffrys was engaged to go with them. They durst not venture to trust BRIDGE-

MAN

MAN with the receipt of the £. 5,000. and have no hand over him at all. These Notes were taken to enforce an application of the money, in case they had found him disposed to have broken his chains; and I observe the money is ready the very month after the Notes were given.

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Attornies, by being entrusted with their Clients secrets, must always have a great influence and ascendancy over them: they are the great money-borrowers now all over the nation. The wants, the pressures, and the keenness of men's passions to get money, for the gratification of their vices or their follies, would make them give any thing to expedite or accelerate a Loan. Men are really not free agents under such circumstances; they are as much, or more, under the influence of their Attorney in negotiating a Loan, as in the prosecution or defence of a Suit; and the reason of the Decree in *Walmseley and Booth* (a), applies strongly to the present Case. I have no doubt, nay I know, there are many Attornies who would have died before they would have acted such a part as *Lock* has done in this affair. If there are any who forget that they are Ministers of Justice, and not only stand by and see their Clients robbed by Footmen, but are themselves accessory to the robbery, and divide the plunder; this Decree will inform them they shall not do it with impunity. It is their Duty to avert the blow which fraud and imposition aim at their Clients. This Court has frequently made them answerable for gross laches and negligence in the placing out their Clients money upon sham or insufficient securities; but where, instead of averting the blow, a man's own Attorney directs and guides the hand that strikes it,—this Court cannot but express the greatest resentment and indignation at such a behaviour: and though, in general, Costs are not given

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(a) 2 Atk. 25.

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against persons who are not Parties to the Suit; yet, as LOCK was a Party to the original Cause, and they were both brought on together, and he had the management of both the Causes, and the subject matter of both the Causes, as to this point, was the same; and he was left out of the Cross Cause, only to make him an Evidence; and he has so grossly misbehaved himself in his Profession, and that misbehaviour has been the occasion of both the Suits, and of the Costs expended by BRIDGEMAN, he ought in Justice and Equity to pay them (*a*).

I have thought upon both the Points as fully as I can, and have had no doubts upon them, and consequently the less occasion to call in the Authority of the Noble Lord who made this Decree. But though I shall always examine, with the utmost freedom, the opinion of every man submitted to my judgment; yet I must own, that if my mind had stood in an equal balance, the Authority of the Noble Lord who made the Decree, would have turned the scale; and I am sure every man, who wishes well to the Laws, Liberties, and Properties of this Nation, cannot but wish that his Opinions may always have the greatest weight with his Successors in this Place.

The other Lords Commissioners being of the same opinion :

ORDER, That the said Decree be

Affirmed.

(*a*) By the original Decree, both the Defendants were directed to pay the Costs of both Suits.

HOUSE OF LORDS.

Die Martis, 9^o Maij 1758.

UPON the second Reading of the Bill, intituled, "An Act for giving a more speedy Remedy to the Subject upon the Writ of Habeas Corpus" (*a*), it is Ordered by the Lords Spiritual and Temporal, in Parliament assembled, That the Judges do attend this House, the first Thursday after the approaching Recess, to deliver their Opinions *seriatim*, with their Reasons, upon the following Questions:

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pus.

1st. Whether, in Cases not within the Act 31 Car. II. Writs of Habeas Corpus ad subjiciendum, by the Law as it now stands, ought to issue of course, or upon probable Cause verified by Affidavit?

2^d. Whether,

(*a*) Which "Bill" was as follows: "WHEREAS the Writ of Habeas Corpus hath, in all Times, been deemed to be the most effectual Security for the Liberty of the Subject, against every kind of wrongful Imprisonment or Restraint: And whereas any delay in the awarding or returning of such Writ may be attended with the most fatal consequences to the person under restraint; and, by reason of such delay, the Relief intended to be given may come too late for such person to be discharged from his restraint, or to receive any benefit from such Writ; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the several Provisions which, by an Act made in the thirty-first year of King Charles the Second, intituled, "An Act for the better securing the Liberty of the Subject, and for prevention of Imprisonment beyond the Seas," are made for the awarding of Writs of Habeas Corpus, in cases of commitment or detainer for any criminal or supposed criminal matter, shall, in like manner, extend to all cases where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his or her Liberty,

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2d. Whether, in Cases not within the said Act, such Writs of Habeas Corpus, by the Law as it now stands, may issue in the Vacation by *Fiat* from a Judge of the Court of King's Bench, returnable before himself?

3d. What effect will the several Provisions proposed by this Bill, as to the awarding, returning, and proceeding upon Returns to such Writs of Habeas Corpus, have in practice; and how will the same operate to the benefit or prejudice of the Subject?

4th. Whether,

Liberty, under any colour or pretence whatsoever; and that upon oath being made by such person so confined or restrained, or by any other on his or her behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, is not by virtue of any commitment or detainer for any criminal or supposed criminal matter; an Habeas Corpus directed to the person or persons so confining or restraining the party as aforesaid, shall be awarded and granted in the same manner as is directed, and under the same penalties as are provided, by the said Act, in the case of persons committed or detained for any criminal or supposed criminal matter; and that the person or persons before whom the party so confined or restrained shall be brought by virtue of any Habeas Corpus granted in the Vacation time under the authority of this Act, may and shall, within three days after the return made, proceed to examine into the facts contained in such return, and into the cause of such confinement or restraint; and thereupon either discharge, or bail, or remand the parties so brought, as the case shall require, and as to justice shall appertain.

And be it further enacted by the authority aforesaid, that whensoever any Writ of Habeas Corpus, granted either in term or vacation time, on the behalf of any party so confined or restrained without a commitment for any criminal or supposed criminal matter, shall be served upon the person so confining or restraining such party, or shall be left at the place where such party shall be so confined or restrained, the person so confining or restraining such party shall make Return of such Writ, and bring or cause to be brought the body or bodies, according to the command thereof, within the respective times limited, and under the provisions prescribed by the said Act to Sheriffs and other Officers, in case of commitment or detainer for criminal or supposed criminal matters; and every such person neglecting or refusing so to make return of such Writ, or to bring or cause to be brought the body or bodies, according to the command thereof, within the times respectively limited, and under the provisions prescribed by the said Act to Sheriffs and other Officers, shall be guilty of a contempt of the Court under the seal of which the said Writ of Habeas Corpus shall issue; and shall also for the first offence, forfeit to the party

4th. Whether, at the Common Law, and before the Statute of Habeas Corpus in the 51st of King Charles II. any, and which, of the Judges could regularly issue a Writ of Habeas Corpus ad subjiciendum, in time of Vacation, in all or in what Cases particularly?

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5th. Whether the Judges, at the Common Law and before the said Statute, were bound to issue such Writ of Habeas Corpus ad subjiciendum, in time of Vacation, upon demand of any person under restraint; or might they refuse to award such Writ, if they thought proper?

party grieved the sum of three hundred pounds, and for the second offence, the sum of five hundred pounds.

And be it further enacted by the authority aforesaid, That the several penalties inflicted by this Act shall be recovered by the party grieved, his or her executors or administrators, against the offender, his or her executors or administrators, in like manner as the Penalties inflicted by the said Act are to be recovered.

And, to the intent that no person may pretend ignorance of the import of any such Writ, be it enacted, That all Writs of Habeas Corpus, awarded or to be returned under the authority of this Act, shall be marked by the Court, or person respectively awarding the same, in this manner:

“ By an Act passed in the thirty-first year of the reign of King George the Second.”

And shall also be signed by order of the Court, or by the person respectively awarding the same.

And be it further enacted by the authority aforesaid, That if any action, plaint, suit, or information, shall be commenced or prosecuted against any person or persons for any offence against this Act, the same shall be commenced within twelve calendar months after the time of the offence committed, unless the party grieved be then under confinement or restraint; and if he or she shall be then under confinement or restraint, then within the space of twelve calendar months after the decease of the party so confined or restrained, or his or her delivery from such confinement or restraint, which shall first happen; and such person or persons so sued in any Court whatsoever, shall and may plead the general issue, not guilty, or that he or she owes nothing; and upon any issue joined, may give the special matter in Evidence; and if the Plaintiff or Prosecutor shall become nonsuit, or forbear further prosecution, or suffer a discontinuance; or if a Verdict pass against him or her, the Defendant shall recover his or her Costs; for which he or she shall have the like remedy as in any case where Costs by the Law are given to Defendants.”

6th. Whether

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6th. Whether the Judges, at the Common Law and before the said Statute, were bound to make such Writs, so issued in time of Vacation, returnable *immediaté*; and could they enforce obedience to such Writ issued in time of Vacation, if the party served therewith should neglect or refuse to obey the same, and by what means?

7th. Whether, if a Judge, before the said Statute, should have refused to grant the said Writ, upon the demand of any person under any restraint, the subject had any remedy at Law, by Action or otherwise, against the Judge for such refusal?

8th. Whether, in case a Writ of Habeas Corpus ad Subjiciendum at the Common Law be directed to any person returnable *immediaté*, such person may not stand out an *Alias & Pluries* Habeas Corpus, before due obedience thereto can be regularly enforced by the course of the Common Law?

9th. Whether the said Statute of the 31st of King Charles II. and the several provisions therein made, for the immediate awarding and returning the Writ of Habeas Corpus, extend to the Case of any man compelled against his will in time of peace, either into the land or sea service, without any colour of legal authority; or to any Cases of Imprisonment, Detainer or Restraint whatsoever, except Cases of Commitment for criminal or supposed criminal matters?

10th. Whether in all Cases whatsoever, the Judges are so bound by the Facts set forth in the Return to the Writ of Habeas Corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the Judges, by the clearest and most undoubted proof, that such Return is false in fact, and that the person so brought up is restrained of his liberty, by the most unwarrantable means, and in direct violation of Law and Justice?

ANSWER,

ANSWER of Mr. Justice WILMOT (*a*) to the Questions proposed to the Judges by the House of Lords, on the second Reading of the Bill, intituled, "An Act for giving a more speedy Remedy to the Subject, upon the Writ of Habeas Corpus."

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1st. Question. "Whether in Cases, not within the Act 31 Car. II. Writs of Habeas Corpus ad subjiciendum, by the Law as it now stands, ought to issue of course, or upon probable cause verified by Affidavit?"

Answer.

(*a*) The following was found among Sir Eardley Wilmot's Papers, endorsed by him, "State of the Case on the Prefs Act. April 1758."

"A little before Hilary Term twelvemonth, some applications having been made to Mr. Justice Foster by persons in the Savoy, raised under the annual Act then in force, viz. 29 Geo. II. c. 4, *for the speedy and effectually recruiting of His Majesty's Land Forces and Marines*, he issued Writs of Habeas Corpus, upon which the men were brought up, and let go by acquiescence or consent, without any Return ever being made: but conceiving it to be a matter of doubt and consequence how to proceed in such Cases, he desired the assistance of all the other Judges of the Court of King's Bench, to consider the said Act and what ought to be done.

All the Judges of the Court accordingly met, and the great object of their deliberation was how they might relieve with expedition and effect, in case the great power given by the Act was abused, without defeating the end of the Act and the view of the Legislature where the power was not abused.

They considered the matter together and separately; they talked with some of the most eminent Counsel, and it has since been sifted to the bottom. The more it is examined, the more it will be found that what the Court did, was not only the best, but the sole remedy that could be devised to relieve the subject under immediate oppression from an abuse of the great power given by that Act, until the Parliament should expressly declare their pleasure in the new Bill for the next year, which, from the ordinary course of business, was expected to pass in about six weeks or two months. To shew this, it may be proper,

1st. To consider the nature of the Act.

2d. How men, wronged by the Commissioners in the first instance, might afterwards be speedily and effectually relieved.

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1st. The

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Answer. I am of Opinion, that in Cases not within the Act of the 31 Car. II. Writs of Habeas Corpus ad subjiciendum, by the Law as it now stands, ought not to issue of course, but upon probable cause verified by Affidavit.

A Writ which issues upon a probable Cause, verified by Affidavit, is as much a Writ of Right, as a Writ which issues of course.

There

1st.—The Act is founded in the violation of private liberty ; and the cause alledged for such violation, is the want of a speedy and effectual Recruit.

There cannot be a speedy and effectual Recruit, unless the law receives a speedy and immediate execution ; therefore the Parliament entrusted Commissioners, named by the Act, to execute the powers therein mentioned.

The power given to the Commissioners, is to change the condition of men, under certain descriptions, into the condition of Soldiers, against their will.

The Act requires several circumstances to be observed before the condition of the Recruit is to be completely changed : but when those circumstances are observed, the Act declares him a Soldier to all intents and purposes whatsoever.

The custody or imprisonment in any secure place, whether private house or prison authorized by the Act, is temporary, casual, and a mere consequence of the man's condition being changed into that of a Soldier. It is only a detention, to secure him till he can join the Corps ; and gives him no other right to controvert his being a Soldier, than he would be entitled to when he has joined the Corps.

It seems from the words and meaning of the Act, that where all the circumstances have been observed, the persons under whose care or authority the Recruit happens to be delivered, are authorized to treat him as a Soldier, to all intents and purposes, without being obliged to prove him within the description.

1st. From the words :—

Every Clause is studiously penned, to avoid the possibility of a supposition that the Recruit's being within the description was necessary to be proved by every person to whom he was delivered, and that the change of his condition was for ever to depend upon proving that he was within such description.

The Parish Officers are directed “ to bring before the Commissioners all such Persons as they can find, who are or shall appear to them to be within the description of “ the Act.”

And the Commissioners are strictly to examine all such persons as shall be so brought before them ; and if, upon examination, they shall find that such persons shall come within

There are many other Writs, besides the Writ of Habeas Corpus, which fall exactly under the same circumstances: Writs of Mandamus, Prohibition, 1 Syd. 65. Sir R. Raymond, 4. Supplicavit, Ne exeat regnum, the Writ of Homine replegiando;—are all Writs of Right; but a proper Case must be laid before the Court by Affidavit, before the parties, praying such Writs, may be entitled to them. They are the birthright of the people, subject to such Provisions as the

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within the descriptions therein mentioned; and the Commissioners, and the Officer who shall be appointed to receive the Recruits, shall judge them to be such as shall be thereby intended to be entertained as soldiers in His Majesty's service, then the Commissioners are to cause such persons to be delivered over to the person appointed to receive them.

The Clause enabling the Parish Officers, after the second meeting of the Commissioners, to take up and detain, without any warrant, such persons as they should find, or should appear to them to be within the description of the Act, directs the lifting and delivering of them over at the next meeting, if judged within the description of the Act.

The Clause relating to the age, size, religion, and bodily condition of the Recruits, refers to what shall appear in the opinion of the Commissioners and Officer appointed to receive them.

The Clause relating to the Voters, is conceived in such terms as shews the validity of the lifting was not to depend upon the right to vote; but upon the Recruits making it appear to the satisfaction of the Commissioners then present, that he had a right to vote.

After reading the Articles of War, the Act says, "he shall be deemed a Soldier to all intents and purposes, and shall be subject to the discipline of War, and in case of desertion, shall be proceeded against as a Defenter."

The Act directs many Entries to be made; but directs no Entry of the examination or grounds upon which the Commissioners find him to be within the description of the Act.

2dly. From the intention of the Act.

The cause of the Act was a speedy and effectual Recruit; but after all the trouble and expence the Public has been at, they would scarce have the benefit of a single man against his will, if the persons to whom he is delivered, were obliged to prove him within the description: they are strangers to the proof upon which the Commissioners proceeded; and if they knew it, they could not avail themselves of the same kind of proof, which the Act authorizes the Commissioners to receive; for they are warranted by the Act to proceed upon the examination of the persons themselves, and to judge from what

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the Law has established for granting them. Those Provisions are not a check upon Justice, but a wise and provident direction of it.

The very learned and able men who framed the 31 Car. II. could not avoid taking these Writs of Habeas Corpus for private custody, into their consideration. Three or four years before that Act passed, there

they do or do not say; but a person cannot be examined against himself in any legal proceeding.

No Officer could inquire into the qualifications of Recruits brought from all Parts of the Kingdom. In what condition must they be, if they could not justify treating or punishing the Recruit as a Soldier, without proving he was within the description?

Upon the perusal of the Pressing Acts which passed in Queen Anne's reign, many observations occur:

The 5th of Queen Anne gives a power of Review to the Commissioners, at any time, which was not in the former Acts.

The 7th of Queen Anne omits the power of Review; and the proviso as to Voters is varied, and describes such persons as shall make it appear that they have a vote.

The 10th of Queen Anne is the same as the 7th; but restores the Clause of Review, limiting it to six weeks.

The Clause of Review was omitted in the 29th George II. and in all the Acts made in this King's reign, before the 29th George II.

The execution of the special powers given by this Act, for the purposes therein mentioned, is like no other Case whatsoever. It is not like a Conviction: it is not in writing: it is not by way of punishment for an offence. There is no other evidence required than what the man says, or does not say, upon his examination. If it was to be compared to an Order, then the evidence need not be set forth; and there never was an instance, upon any of those Acts, of an application for a Certiorari.

This being the nature and intent of the Act;

2d.—The second question is, What Relief a man, who complained that he was wrongfully pressed by the Commissioners, could have by Writ of Habeas Corpus?

When he was at liberty, with the Regiment to which he was delivered, he could have no Habeas Corpus. If he happens to be secured in a private house, or public prison, or other safe place, the accidental custody gives a pretext to apply for a Habeas Corpus to be set at large from that restraint.

The Officer or Keeper must, in his Return, either aver, not only that all the circumstances required by the Act were observed, but that the man was within the description; or else, that all the circumstances were observed, and rely upon them as a sufficient Cause and Justification, without averring the man to be within the description.

The

there had been two very great Cafes, extremely agitated in Westminster Hall, upon Writs of Habeas Corpus for private custody, viz. the Cafes of Lord Leigh, 2 Lev. 128. and Sir Robert Viner, Lord Mayor of London. 3 Keb. 434. 447. 470. 504. 2 Lev. 128. Freem. 389. But they wisely drew the line between civil constitutional Liberty,

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The first form of Return could only be made upon the credit of what the Commissioners had done, and a presumption that they had done right.

It is impossible for the Officer or Gaoler to proceed upon any other ground; and in execution of the trust reposed in him, he ought to give credit to their judgment, and proceed upon that foundation.

In this case, the only remedy of the Recruit would be an action for a false Return; and no Jury would give more than trifling damages against an Officer acting "bonâ fide," and making a Return in support of the trust which was reposed in him, the truth of which he could no otherwise come to the knowledge of.

Suppose the Return made in the other form, the observations before mentioned tend to shew that it would be sufficient. In that case, no man who admitted all the circumstances in the Act to have been observed, could be entitled to Relief by Habeas Corpus; because upon his own shewing there appeared sufficient cause.

In this form the King's Counsel had prepared and settled the draft of a Return: suppose that form not sufficient; the other must have been followed of course, as the only one possible to be made by the Officer or Gaoler.

But to go farther; suppose the man set at large by virtue of the Habeas Corpus, from the custody of his temporary Keeper for want of Cause, or sufficient Cause; shewn by the Officer or Gaoler, or upon any other reason; he would be in no better condition than if he had never been secured at all, and would be liable to be taken up, prosecuted, and shot for Desertion.

The end of the Habeas Corpus is only to set him loose from the Custody, not to determine whether he is a Soldier. The merits of that Question could not be determined in proceeding upon a Writ of Habeas Corpus against the Gaoler or temporary Keeper. The Gaoler's acquiescence to let men go, by making no defence to a Writ of Habeas Corpus, could no more release them from being Soldiers, than his voluntarily giving them leave to go.

In this light, a discharge by Habeas Corpus, for want of defence by the Keeper, might be a cruel snare to poor and ignorant men: no effectual Relief can be given, but in some way which may, as between proper parties, decide the Question whether the man's condition was changed into that of a Soldier. If such a way cannot be devised, a Recruit so raised by the Commissioners, must be absolutely without remedy.

In other Cafes, if a man be treated as a Soldier, who is not duly listed or subject to military

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erty, as opposed to the power of the Crown, and Liberty as opposed to the violence and power of private persons. They thought this power of judging might be abused in favour of the Crown, but they saw no danger of an abuse of it as between one subject and another; and therefore they applied the remedy to the evil they had seen

litary discipline, he has his Action; nay, the Officer who so treats him, may, according to the nature of the Case, be criminally liable. But where a man is raised under the Act by the Commissioners, though wrongfully, yet, the circumstances of the Act being observed, it is a sufficient justification for treating him as a Soldier. The Officer is a stranger to the grounds upon which the Commissioners proceeded.

Diligent inquiry has been made into the Practice under the former annual Acts of the like kind, and no Cases have been discovered of more than two or three instances, from the 2d of Queen Anne to the year 1746, of applications for Writs of Habeas Corpus, by men pressed under the authority given by any of the Acts during that period.

Only one Return has been found, the Queen and Chamberlayne; and there, upon the face of the Return, the Court sent the man back without any other Inquiry.

In the year 1746, in the Case of King and White, the Lieutenant of the Tower made a Return in the same form.

It was impossible to say the Return was not sufficient. The Court could not admit Affidavits to contradict the Return; for though in the case of a Wife, where the cause is totally immaterial; or of a Lunatic, where no legal custody under a Commission is returned, Affidavits may have been let in for collateral purposes; yet the truth of a Return, setting forth the execution of a special Authority, Jurisdiction, or Power, cannot be contradicted by Affidavits. It is contrary to all the principles and Authorities of Law; and in the year 1746 there never had existed an instance.

Had the Court then made a Precedent to contradict the truth of the facts contained in a Return by Affidavits, it could only have been justified by the end; but it would have been dangerous, as a deviation from a general rule of Law, and applicable to other Cases.

The Court took another way: upon reading Affidavits, they made a Rule upon the Commissioners to shew Cause; and for want of Cause being shewn, discharged the man. After a sufficient Return to the Habeas Corpus, the use of the Writ was at an end. No Relief could be given by it. The Relief was given in consequence of the Rule, and by virtue of the Rule only.

We were glad to follow and improve the plan of this Precedent, by directing Notice likewise to be given to the Officers of the Crown, that Mr. Attorney General might be heard in behalf of His Majesty. The King, in behalf of the public, is alone concerned in the Question, whether the Recruit's condition be changed into that of a Soldier.

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seen and experienced, and left the Law as they found it in respect of private persons.

There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges: they are all Writs of Right; but they are not all Writs of course.

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If that Question were determined in any method where the King was really, not nominally, a Party, and by his Officers substantially heard or consenting; we thought the man might be discharged from the condition of a Soldier, and set at liberty.

An intimation was given to the Practisers, and also in Court, of the Judges Conference.

In the first Case, the then Attorney General being ill, Mr. Solicitor General came into Court and declared on behalf of the Crown, that there was no objection to discharging such men as should appear to the Court to have been unjustly pressed.

No person ever applied afterwards for a Habeas Corpus, who, upon being asked which he meant, did not change his application into a Motion for the Rule.

No Counsel desired to argue the Question, whether they ought not to have a Habeas Corpus instead of the Rule; if they had, they would certainly have been heard; had it been insisted upon, for the more solemn determination of the Question, a Habeas Corpus would have been granted; but it would have been cruel to the particular person not to have given Notice of the result of the Consultation among the Judges, or to have put a poor man to the delay and expence of litigating a point, contrary to the opinion the Court had once conceived, when he had another and easy remedy.

The Consent given on the part of the Crown was never retracted; the most eminent Counsel who practise in the Court of King's Bench, have publicly averred, that the Court in fact never refused a Writ of Habeas Corpus to any pressed man in custody; and no man, who pretended to know any thing of the matter, has from his own knowledge said the contrary. The Legislature, by the Bill now in force, made alterations tending to explain the Law in the same way; for they have directed that the Commissioners should levy such able bodied men, who could not, upon examination, prove themselves not to be within the description of the Act.

They have given a power of Review to the Commissioners themselves within ten days; and if the Recruit is discharged, the levy money is directed to be returned; and they have likewise prescribed a particular form of Entries to be made in columns; but no Entry is required of the proof or examination upon which the Recruit is raised.

By this Act the Legislature gave more than a silent sanction to what the Court has done, and strengthened the reasons for pursuing it. There is now depending a Case upon the Rule, in which no Habeas Corpus could possibly have issued."

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Writs of course, are those Writs which lie between party and party, for the commencement of Civil Suits: and if they are sued without a good foundation, the Common Law punishes the Plaintiff for suing out the Writ vexatiously, by amercing him “pro falso clamore.” And by the Statute Law, he is to pay the Costs of the Suit.

But the Writ of Habeas Corpus is not the commencement of a Civil Suit, where the party proceeds at the peril of Costs, if his complaint is a groundless one: it is a remedial mandatory Writ, by which the King’s supreme Court of Justice, and the Judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the Cause of his Imprisonment; and it is a Writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the Common Law, to all Dominions held of the Crown. It is accommodated to all persons and places. 2 Cro. 543. Palmer, 54. And, as all these remedial mandatory Writs were, originally, rather the Suits of the King than of the Subject, the King’s Courts of Justice would not suffer them to issue upon a mere suggestion; but upon some proof of a wrong and injury done to a Subject.

Writs of Habeas Corpus, upon imprisonment for criminal matters, were never Writs of course: they always issued upon a Motion, grafted on a copy of the Commitment; and Cases may be put in which they ought not to be granted. 1 Lev. 1. Comber. 74. Habeas Corpus was denied to one committed to Bridewell for lewdness. 3 Bul. 27. 2 Mod. 306. If malefactors, under sentence of death in all the Gaols in the Kingdom, could have these Writs of course, the sentence of the Law might be suspended, and perhaps totally eluded by them.

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The 31 Car. II. makes no alteration in the Practice of the Courts in granting them: they are still moved for, in Term time, upon the same foundation as they were before: and when a single Judge in Vacation grants them under the 31 Car. II. in criminal Cases, a copy of the Commitment, or an Affidavit of the refusal of it, must be laid before him. He must judge, even in that case, whether Treason or Felony is specially expressed in the Warrant of Commitment: and there have been a great number of Cases where a doubt has arisen on the frame and wording of the Warrant; so that even upon the Act, the probable cause of Bailing is really disclosed to the Judge, unless the copy of the Commitment is refused, and then the Law will presume every thing against it; and in Cases out of the Act, which take in all kinds of confinement and restraint, not for criminal, or supposed criminal, matter, and to which this Question relates, it has been the uniform uninterrupted Practice, both of the Court of King's Bench, and of the Judges of that Court, that the foundation, upon which the Writ is prayed, should be laid before the Court or Judge who awards it.

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The reasons of guarding the Writ in this manner, I take to be these: There are many kinds of private Restraint that are lawful. There was a much greater number formerly. The Reformation opened the doors of Religious Prisons; and the abolition of Military Tenures unfettered an unhappy class of men, called Villeins, who lived in a state of captivity under their masters.

There are many kinds of Restraint that exist at this day; some in the nature of Punishments. In domestic government, which takes in the Case of Husbands, Fathers, Guardians, and Masters, the Law

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authorizes Restraints, in order to enforce a performance of those natural, moral, and civil duties, which Wives, Children, Wards, and Apprentices, owe to their Superiors, in their several relative capacities. These domestic Governments could not subsist without such authorities; and therefore all States have endeavoured most anxiously, some in a greater degree, and others in a less degree, to preserve the greatest reverence for them.

The wisdom of our Ancestors would not suffer this kind of Authorities to be broken in upon wantonly, upon mere suggestion, and without seeing some reason for an interposition; because they saw it would have encouraged disobedience and rebellion in private families; and, at all events, must have abated that awe and respect which act so materially in the support of those Authorities. They may be abused: if they are, the Law says, let it be shewn, and the party shall have Relief; but if he cannot shew they are abused, he is entitled to none. The legal presumption is certainly in favour of these Authorities; the Law will not presume they are unduly or irregularly executed.

But if these Writs were to have issued without any Case made, they must have issued indiscriminately, in the Cases of lawful Restraints, as well as unlawful ones; which would have been levelling all distinction between them, and have been subjecting the authority of Fathers, Husbands, Guardians, and Masters, to be canvassed and questioned in the same manner, and upon the same suggestions, as the extravagant outrages of persons acting without any authority at all.

It would have been proceeding upon an inversion of the legal presumption, and would thereby have destroyed all that order, discipline,

pline, and subordination in private Families, which lead men into a habit of obedience, and dispose them early to obey the Laws of their country.

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When a Judge is called upon for a Habeas Corpus, in order to bail a man for a bailable Offence, the injustice of the imprisonment is obvious and self-evident: for Imprisonment before Trial, being only to secure his being amenable to justice; if that Security can be obtained by Bail, in bailable offences, it is unjust that he should be kept in Prison. The Authority which committed him ought to have bailed him.

The Authorities I have mentioned are equally legal, and therefore within the spirit and reason of the Habeas Corpus Act itself. The injustice of the Imprisonment ought to appear in the first instance, before the Party has a right to demand the remedy.

The Law laid this check, to prevent that scene of disorder and confusion which must arise, if Wives, Children, Wards, and Apprentices, or any other person in their name, and on their behalf, were to be at liberty, without any foundation or cause shewn, to force a production of them in Westminster Hall, or before a Judge, wherever he should happen to be, whenever they pleased, and as often as they pleased, at a risk of having them rescued out of their hands, "in transitu," and without a possibility of a satisfaction from any body.

There are many other lawful Restraints besides those arising under the Authorities I have mentioned:—All persons who are in custody upon Civil Process, or under special Authorities, created by Act of Parliament, proceeding "civiliter," and not "criminaliter," against the persons who are the objects of them:—Persons who are bailed, Paupers in Hospitals or Workhouses, Madmen under Commissions

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of Lunacy, or confined by Parish Officers, under the Vagrant Act of 17 Geo. II. are all under a lawful confinement.

If all these persons were to have had these Writs of Habeas Corpus of course, without shewing any cause or foundation for granting them, it would have been suffering this great Remedial Mandatory Writ to have been used as an instrument of vexation and oppression; it would have become a weapon in the hands of madmen, and of dissolute, profligate and licentious people, to harass and disturb persons acting under the powers which the Law had given them.—One most frightful instance occurs: the Case of a crew performing Quarantine.—If this Writ were to issue of course, it might bring back pestilence and death along with it.

The check upon the Writ, by requiring a probable cause to be shewn before it issues, is only saying, “shew you want redress, and you shall have it:” and if a person cannot disclose such a Cause himself, as to shew he is aggrieved when he tells his own story, and is not opposed or contradicted by any body; it is decisive against his being in such a condition as to want Relief.

Besides the Practice, which is a decisive evidence of the Law, it appears from a Case (a) Hilary, 8th King William, called Griffiths’s Case, that the Court would not grant this Writ, until a probable cause was laid before the Court that the party was entitled to it.

(a) From a
manuscript of
Lord Ray-
mond, in pos-
session of Mr.
Filmer.

When this Writ was first applied to relieve against private Restraints, does not appear; but whenever it was, the manner of issuing it seems to have been adopted from that of the Writ of *Homine replegiando*, which was the true common Law remedy for the assertion of liberty against a private person: and that Writ never issued of course, but was applied for by Petition to the Great Seal, and an Affidavit made,

made, disclosing the foundation on which it was prayed. State Trials, 3 Vol. 632. 2 Lill. Pr. Reg. 23. 2 Freeman, 27. Jennings's Case, upon Affidavit made, that Jennings had got a young Heiress into his custody without the consent of the Guardian, upon the motion of the Attorney General, a Homine replegiando was granted. And as the Law checked that Writ of Homine replegiando; the Habeas Corpus, which seems by Practice to have been substituted in its place, took the check along with it.

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Careful as the Law is to prevent this Writ from being abused, it cannot always prevent it: for if a man does not disclose the whole Case, it may issue sometimes where it would not have issued, if the Case had been fairly stated.

I will mention one Case, which happened last term, and which shews the reason of the Law, in expecting to see a full state of the Case before the Writ issues.

A gentleman applied to a Judge of the Court of King's Bench in Vacation time, for a Habeas Corpus to his Wife's mother, to bring up his Wife, upon an Affidavit of detention of her from him. As it was near Term, the Writ was returnable first day of Term.

Burr. 5.

The fact was, that they had entered into Articles of Separation, which had determined his right to the custody of his Wife; the mother brought the Wife into Court, and returned the Articles of Separation. The Return was of great length, and the Mother was put to a very great expence in the making it, and if she had brought her Daughter from the remotest part of the Kingdom, she could have had no satisfaction at all.

If the Affidavit had disclosed the Articles of Separation, as it ought to have done, the Court, or Judge, would have said, "you have no right

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right to the Relief you pray, and therefore must not put the Parties to costs and vexation, in a Case which is remediless of your own shewing."

2d Question. Whether in Cases, not within the said Act, such Writs of Habeas Corpus, by the Law as it now stands, may issue in the Vacation by Fiat from a Judge of the Court of King's Bench, returnable before himself?

Answer. I am of Opinion that in Cases, not within the Act of the 31st Car. II. Writs of Habeas Corpus ad subjiciendum, by the law as it now stands, may issue in the Vacation by Fiat from a Judge of the Court of King's Bench, returnable before himself.

From the best Inquiry I can make, Writs of Habeas Corpus, in criminal Cases, have been awarded by the Chief Justice of the King's Bench, and the Judges of that Court, long before the 31st Car. II.

The files of the Fiats for Writs made out in the Crown Office before the Reign of Car. II. are not to be found there, except for four or five Terms in Queen Elizabeth's time, one or two in James I. and for six or seven Terms in Car. I.

No information is to be had from the Records; but there are traces from Cases in print, and from Fiats since the Restoration, and before the 31st Car. II. that there had been a kind of unsettled Practice for the Chief Justice, and Judges of the Court of King's Bench, granting them in Vacation; and as the Judges of that Court are Justices of Peace all over the kingdom, they have a power of Bailing, as incident to that Authority; and I don't see how that power of Bailing could well be exercised, without removing the person to be bailed before them by Habeas Corpus.

Catesby's Case in Vacation, is in Hilary, 43 Eliz. in the 7th vol. of the State Trials, 175.

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I have a list of Fiats for Habeas Corpus, since the Restoration, and before the 31 Car. II. Thirty of them appear to have been granted and made returnable before the Judges in Vacation. Since the 31 Car. II. these Writs have issued, in criminal Cases, under that Act, when granted at the instance of a Subject.

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As to Writs of Habeas Corpus in Cases of private custody, I cannot ascertain the commencement of their being first issued by the Court.

By the common Law, the liberty of a man's person against private persons, acting without any legal authority, was protected in this manner :

1st. First, the Law gave every man a right to repel force by force, and to defend his Liberty in the same manner as he might his Life.

2d. As every unlawful Imprisonment was a breach of the Peace, it must be proceeded against as such, by Justices of Peace; and the delivery of the Party perhaps enforced by a rigorous execution of that Authority. It might also be punished by Indictment. Satisfaction might likewise be recovered for the injury, by an Action of false Imprisonment.

The Writ of *Homine replegiando*, as mentioned before, was the only specific remedy provided by the common Law, for the protection and defence of his Liberty, against any private invasion of it.

Though there is an "obiter" saying by Justice Wild, in Carter, 222. of a Case where the Court sent a Habeas Corpus to Dr. Pruejean, beyond sea, for Sir Robert Carr's brother, yet it is so loosely stated, I lay no stress upon it.

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The first Case is the Case of Sir Philip Howard, mentioned in Lord Leigh's Case, and therefore must have been before that time. Lord Leigh's Case was in the 27 Car. II. where Habeas Corpus was granted to bring up his Wife. And the Case of Viner and Emmerton was in the 27th year of Car. II. where a Habeas Corpus was granted to Viner to bring up his Daughter-in-Law, viz. his Wife's daughter by a first husband. From that time to this, the Court has constantly granted them.

When the Practice of the Chief Justice, and the Judges of the Court of King's Bench, granting these Writs in Vacation, in Cases of private custody, first began, does not appear; but in all probability, it was either coeval with what the Court did, or very soon followed it; because the principle which supports the one, concludes as forcibly to the supporting the other: and the principle is this; if the Writ is applicable to one species of unlawful imprisonment, it is in reason equally applicable to another. They are Cases "ejusdem generis;" and therefore let the usage of issuing this Writ have begun sooner or later, it was in the first instance a warrantable extension of a legal remedy in one Case, to another Case of the same nature; and I consider the Usage in this Case as the voice and testimony of the Judges, for near eighty years together, to the legality of the very first application of it.

The principle upon which the Usage was founded, lay in the Law; and the Usage is nothing but a drawing that principle out into action, and a legal application of it to attain the ends of Justice. It is upon this foundation only, that an infinite variety of Forms, Rules, Regulations, and modes of Practice in all Courts of Justice must stand, and can only be supported.

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In many instances, an Usage for some time is considered as an evidence of an antecedent immemorial Usage, and therefore may be called the Common Law. 2 Co. 16. b. Lane's Case. "The customs and courses of the King's Courts are as a Law. The course of a Court makes a Law."

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But when the commencement of an Usage can be fixed and ascertained, it cannot be supported by a presumption, and the legality of the Usage must then depend upon some other principle; and that principle is this, "*ubi eadem est ratio, ibi idem est jus*;" a Writ applicable to one kind of imprisonment, is in reason equally applicable to another.

It would be endless to enumerate instances where the King's supreme Courts of Justice in Westminster Hall have, for the ease and benefit of the Suitors of the Court, reformed, amended, and new moulded and modified their Practice, as from experience and observation they found it would best advance, improve, and accelerate the administration of Justice; and all acts done by Judges at their Chambers, and by Officers of the Court, either in Term or out of Term, are under a delegated authority from the Court. They are controulable by the Court, and obedience to them must be enforced by the Court. And the acts done in Court and out of Court, taken together, form that system of Practice by which the benefit of the Law is dealt out to the people.

I will mention an instance where a Writ has been extended by Usage to a purpose much beyond the original intention of it, viz. "*Ne exeat regnum*;" which is a State Writ to restrain people from going abroad; first used to hinder the Clergy from going to Rome; then extended to Laymen, machinating and concerting measures

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against the State; now applied to prevent a subterfuge from the justice of the nation, though in matters of private concernment, in order to get Bail for an equitable demand, upon Affidavit of intention to go abroad.

The legality of that application was settled in Car. II.'s time, upon an Usage first begun in the time of James I. 1 Ch. Ca. 115. Read against Read. 2 Ch. Ca. 245. If Usage, where the commencement of it was known, could legitimate a Process which is to take away a man's Liberty, surely Usage, founded upon a legal principle, will legitimate a Process which is applied to protect it.

I will mention a Case in the 13 Hen. VII. fol. 17. where the mode of Proceeding, in one kind of Action, was translated to another, in favour of Liberty. Action of Trespass—Plaintiff sets forth that he was a Freeman, and that the Defendant claimed him to be a Villein, so that he durst not go about his business, and that the Defendant had taken some of his goods; and he prayed that the Defendant might give Security to deliver them, and not take any more of them, or his body, pending the Writ. This was the practice in a “Homine replegiando;” and in a “Homine replegiando,” the Plaintiff was to give Security to deliver his body in case the Action was determined against him.

It was resolved they should find security to one another, as if it had been a “Homine replegiando;” and the Court said, “it was good discretion to favour Liberty as much as might be by reason.” They applied the Provisions applicable to one Writ, to another Writ, because it fell under the same reason, and was to favour Liberty.

It has been lately said, that the Practice of issuing these Writs by the Judges in Vacation, was taken up under an apprehension of their being within the 31 Car. II. and that they have been marked in the

Crown Office by that Statute. How such an apprehension or Practice could have prevailed, is to me inexplicable! No man could ever have such an apprehension who had ever read the Act: it is confined in words, and by the nature almost of every provision in it, to criminal, or supposed criminal, matter.

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As to marking them by the Statute, as there were fifty Writs in criminal Cases, for one Writ in the Case of private Custody, the mistake might easily be made; if observed, could do no harm: it might quicken the returns; or be an inaccuracy in the Office: I lay no stress upon it; because we see some few Writs of Habeas Corpus, issued by the Court, marked by the Statute, and yet the Act gives the Court of King's Bench no power of awarding these Writs, but leaves that power exactly as it found it; and therefore it might as well be inferred, that the Court thought their power was by the Statute, when their Writ was marked by the Statute, as that a single Judge thought his power was by the Statute, because the Writ was marked so.

I will never offer such an indignity to the very great and eminent men who have presided in that Court, and to the succession of Judges who have sat in it for near eighty years, as to say, that they founded this practice upon a mistake which could not have infected the meanest capacity.

I must say they never read the Act if they thought so. And Griffiths's Case, already cited, shews that these kinds of Habeas Corpus were understood not to be within the Act.

Lord Chief Justice Hale does say, in second Volume of Pleas of the Crown, 145. that this Writ is not regularly to issue but in the Term time, when the Court may judge of the Return, or bail or discharge the prisoner; and in page 147, he says, it seems, "regularly,"

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this Writ should issue out of the Court of Chancery in Vacation time, and out of the King's Bench in Term time.

That word "regularly," alludes to some unsettled Practice of the Judges issuing that Writ in Vacation.

This was a noble, but a posthumous, work, not fitted by him for the press, nor corrected; and, I have heard, a Collection of Notes made by him before the Restoration.

If it was, then the Precedents and Practice since the Restoration, were not taken into his consideration; and yet the Practice after the Restoration, and even his own Practice, varied the Law extremely from what he asserted it to be in his book: for he says, that this Writ issues for matter only of Crime; and that assertion is confuted by his own Practice, because he was Chief Justice when the Writs were awarded in Lady Leigh's Case, and Viner's Case, in the 27 Car. II. which were not for matters of Crime, but for private custodies; and Viner's Case seems to have been as much agitated as any Case could be, and there never was the least objection to the Court's right of awarding the Writ. That circumstance is decisive against his Authority upon the nature of this Writ; or rather a declaration that he changed his opinion, and thought it might issue for other matters.

In 2 Inf. 53. and 4 Inf. 81. 182. Lord Coke says, "it ought to issue out of the Court of King's Bench in Term time, and out of Chancery either in Term time or Vacation." All Writs, in supposition of Law, do issue in the Term; and he might mean no more, than that Judges could not grant them by their own proper authority, as separate and detached from the Court, as they issue Warrants.

First, this was no judicial determination; a mere "prolatum," which, as to the Court of Chancery, is very doubtful. For no Writ

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of Habeas Corpus can be found to have ever issued out of the Court of Chancery, except some returnable in the House of Lords. The 16 Car. I. takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the Writ had issued out of that Court in Vacation. And the 31 Car. II. seems to proceed upon a supposition, that it could not issue out of the Court of Chancery, because the 10th Section expressly empowers the Court of Chancery to grant it, which would have been unnecessary, if it could have granted the Writ before; and it only shews, what I really take to be the truth of the Case, that there was no settled fixed Practice, then established, of their issuing in Vacation; but if they could not, nor ever did issue out of the Court of Chancery, it is the strongest reason that can be urged in support of the Practice of issuing these Writs by the Judges of the Court of King's Bench, in Vacation, before the Statute, because there could not otherwise have been a perfect and complete remedy at all times for the subject against imprisonment, for a bailable Offence at the Common Law, and before the Statute of 31 Car. II.

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That Act proceeds upon a supposition of a Practice of that kind then prevailing. To what purpose is the Writ to be marked by the Statute, if the Judges, in Vacation, could issue no Writ of Habeas Corpus ad subjiciendum, but under this Statute? That direction was to distinguish this Writ, when issued at the suit of a subject to be bailed, from every other Writ of this nature, which the Judges in Vacation might issue: not meant to give a power which they did not exercise before, but to reduce an unsettled, informal, vague Practice, into a formal regular System, as to the bailing for bailable Offences, and to correct the abuse of any power which they had in fact exercised.

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But upon Lord Coke's own principles, suppose no such Practice when he wrote, yet a subsequent Practice, founded upon legal principles, and an experience of its utility, has made the Law; "*per varios actus legem experientia fecit.*" Lord Coke's averment has not the weight it would have had, if made after 31 Car. II.; according to his own principles, the Practice would have made it Law; and as it appears by the Fiats between the Restoration and the 31 Car. II. that three Chief Justices, Foster, Hyde, Keyling, and four Judges of the Court, Morton, Twifden, Mallet, and Wyld, granted these Writs in Vacation, and the Practice is warranted by legal principles, and it is admitted they were always grantable "*pro Rege,*" (which establishes the Vacation right) the opinion both of Lord Hale and Lord Coke may be true; and, upon Lord Coke's own principle, if he had written twenty years after the Restoration, instead of thirty years before it, he must have been of the Opinion I now give.

As to the 4th (a) and 5th Questions upon your Lordships Paper, viz.
4th Question. Whether, at the Common Law, and before the Statute of Habeas Corpus in the 31 King Car. II. any, and which, of the Judges could regularly issue a Writ of Habeas Corpus ad subjiciendum, in time of Vacation, in all or in what Cases particularly?

5th Question. Whether the Judges at the Common Law, and before the said Statute, were bound to issue such Writs of Habeas Corpus ad subjiciendum, in time of Vacation, upon the demand of any person under restraint, or might they refuse to award such Writ if they thought proper?

(a) At the Request of the Judges, the 3d Question was waived by their Lordships.

Answer.

Answer. I think the Chief Justice of the Court of King's Bench, and the other Judges of that Court, did in fact issue them in Vacation, before 31 Car. II. in criminal Cases, and might do so on principles of Law; possibly it might be done at first for the King only, and afterwards for the Subject; but I do not think there was any settled course of Practice observed in granting them before the Statute, and that such unsettled manner of Practice produced the Statute in the Cases of bailable offences: and, in Cases out of the Act, Usage has now fixed a regular course or manner of granting them; but I desire to be understood, that the present Usage of granting them must be supported upon such principles of Law, as would have supported the granting them when such Usage first began. And I think they were not bound to grant them upon the demand of any person under restraint, at the Common Law, and before the Statute, any more than they are bound to grant them now upon demand. There must have been some Case made, before they could be bound to grant them at any time.

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6th Question. Whether the Judges, at the Common Law, and before the said Statute, were bound to make such Writs, so issued in time of Vacation, returnable "immediaté;" and could they enforce obedience to such Writ so issued in time of Vacation, if the Party served therewith, should neglect or refuse to obey the same, and by what means?

Answer. I am of Opinion, that the Judges at the Common Law, and before the said Statute, were not bound to make Writs of Habeas Corpus ad subjiciendum, issued in Vacation time, returnable "immediaté;" because I find by the Files of Fiats for these Writs before the Statute, that they were sometimes made returnable "immediaté,"

and

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and sometimes in Term time; and I think the Judges cannot enforce obedience to any Writs of Habeas Corpus, issued in time of Vacation, (whether they issue in Cases within the 31 Car. II. or in Cases out of that Act) if the Party served therewith, should neglect or refuse to obey the same, by any means but by Attachment for a Contempt, which can only issue out of Court in Term time.

7th Question. Whether, if a Judge, before the said Statute, should have refused to grant the said Writ upon the demand of any person under any restraint, had the Subject any remedy at Law, by Action or otherwise, against the Judge for such refusal?

Answer. I think that the Subject had no remedy at Law, by Action or otherwise, against the Judge for such refusal. The denying a Writ stands upon the same ground as any other breach of duty.

8th Question. Whether, in case a Writ of Habeas Corpus ad subjiciendum, at the Common Law, be directed to any Person returnable "immediaté," such person may not stand out an Alias and Pluries Habeas Corpus, before due obedience thereto can be regularly enforced by the course of the Common Law?

Answer. I am of Opinion, that in case a Writ of Habeas Corpus ad subjiciendum, at the Common Law, be directed to any person returnable "immediaté," the Court, upon the Affidavit of the service of the Writ, will grant a Rule for an Attachment.

By the course of the Common Law, he might have stood out an Alias and Pluries; but by Practice the course is now altered, and in many Cases the Court has enforced obedience to a Writ for private restraints, in the first instance, by Attachment, for the furtherance of Justice. The method of proceeding by Alias and Pluries, is gone into

into disuse, in almost all Cases, and the process by Attachment substituted in its stead; and that Practice stands upon this legal principle;—that disobeying the King's Writ is a Contempt, and equally a Contempt to disobey the first Writ as the last.

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9th Question. Whether the said Statute of the 31 Car. II. and the several Provisions therein made for the immediate awarding and returning the Writ of Habeas Corpus, extend to the Case of any man compelled, against his will, in time of peace, either into the Land or Sea Service, without any colour of legal Authority; or to any Cases of Imprisonment, Detainer, or Restraint whatsoever, except Cases of Commitment for criminal, or supposed criminal, matters?

Answer. I think they do not extend to the Case of a man so compelled; because the person who compels a man against his will, in time of peace, either into the Land or Sea Service, without any colour of legal Authority, is the Criminal, and not the man impressed. And I think that Act doth not extend to any Cases of Imprisonment, Detainer, or Restraint whatsoever, except Cases of Commitment for criminal, or supposed criminal, matters.

* * * * *

10th Question. Whether, in all Cases whatsoever, the Judges are so bound by the Facts set forth in the Return to the Writ of Habeas Corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the Judges, by the clearest and most undoubted Proof, that such Return is false in fact, that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of Law and Justice?

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Answer.

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pus.

Answer. I am of Opinion, that in no Cases whatsoever, the Judges are so bound by the Facts set forth in the Return to the Writ of Habeas Corpus, that they cannot discharge the person brought up before them, if it shall most manifestly appear to the Judges, by the clearest and most undoubted Proof, that such Return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of Law and Justice. But by the clearest and most undoubted Proof, I mean the Verdict of a Jury, or Judgment on Demurrer, or otherwise in an Action for a false Return: and in case the Facts averred in the Return to a Writ of Habeas Corpus, are sufficient in point of Law to justify the Restraint, I am of Opinion, that the Court or Judge, before whom such Writ is returnable, cannot try the Facts averred in such Return, by Affidavits, in any Proceeding grafted upon the Return to such Writ of Habeas Corpus.

The clearest and most undoubted Proof in the Law, is the Verdict of a Jury; and if the Facts, set forth in a Return, are disproved by a Verdict, I think the Judges are not bound by those Facts in any Case whatsoever, from discharging the person brought up before them; but as I presume the Question means, "Proof by Affidavit," in order to examine the truth or falsity of a Return; I shall consider the Question in that view.

To get at the bottom of it, the nature of this Writ must first be considered: It is a Demand by the King's Supreme Court of Justice to produce a person under Confinement, and to signify the reason of his Confinement.

In Imprisonment for criminal Offences, the Court can act upon it only in one of these three manners:

1st. If

1st. If it appears clearly that the Fact, for which the Party is committed, is no crime; or that it is a crime, but he is committed for it by a person who has no Jurisdiction, the Court discharges.

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2d. If doubtful whether a crime or not, or whether the Party be committed by a competent Jurisdiction; or it appears to be a crime, but a bailable one, the Court bails him.

3d. If an Offence not bailable, and committed by a competent Jurisdiction, the Court remands or commits.

The nature and quality of the Fact with which the party is charged, and the Jurisdiction which has taken cognizance of it, are to be considered on the Return; but the existence of the Fact, that is, whether such a Fact was committed, or whether there is such a Warrant of Commitment as the Gaoler has returned, is a matter which belongs "ad aliud examen." The Court says, "tell the reason why you confine him." The Court will determine whether it is a good or bad reason; but not whether it is a true or a false one. The Judges are not competent to this Inquiry; it is not their Province, but the Province of a Jury, to determine it: "ad questionem juris, non facti, Judices respondent." The Writ is not framed or adapted to litigating Facts: it is a summary short way of taking the Opinion of the Court upon a matter of Law, where the Facts are disclosed and admitted; it puts the Case exactly in the same situation as if an Action of false Imprisonment had been brought, and the Defendant had set forth a series of Facts to justify the Imprisonment, and the Plaintiff had demurred to the Plea. A Return is the same as the Justification demurred to; but, in both Cases, if the Facts are controverted, they must go to a Jury; and when the Return to a Habeas Corpus is made and filed, there is an end of the whole Proceeding, and the

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Parties have “no day” in Court; and therefore it is impossible that a Proceeding, by way of Trial, should be grafted upon it.

All the Arguments upon the Habeas Corpus, in the seventh Volume of the State Trials, 123. 156. take it for granted that it is impossible to go out of the Return; and Mr. Calthorp, who was Recorder of London, a very ingenious man, and argued for the Subject, lays it down, “that it ought to be precise and direct, so as to be able to judge of the Cause, whether sufficient or not. For there may not any doubt be taken to the Return, be it true or false; but the Court is to accept the same as true; and if it be false, the Party must take his remedy by Action upon the Case.”

Mr. Selden likewise in his Argument in the same Book, page 156, says, “The Keeper of the prison returns by what Warrant he detains the prisoner, and with his Return fixed to his Writ, brings the Prisoner to the bar at the time appointed: when the Return is thus made, the Court judgeth of the sufficiency or insufficiency of it, only out of the body of it, without having respect to any other thing whatsoever; that is, they suppose the Return to be true, whatever it be; if it be false, the Prisoner may have his Action on the Case against the Gaoler that brought him.” And it is for this reason the Law requires such exact critical certainty in Returns, because the Party can have no answer to it upon the Return. Nothing can be pleaded to it. It must be taken to be true, until twelve men, upon their oaths, have said that it is false.

To enter into a disquisition of this sort upon Affidavits, would be confounding the offices of Judge and Jury, and introducing a mode of Trial where no issue is or can be joined. The Parties, in such a summary way of Trial, must lose the benefit of a “viva voce” Examination,

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nation, where the looks, the manner, and deportment of the witness, are extremely material to confirm or discredit his testimony: it is found by the experience of ages, that nothing does so effectually explore the Truth as a cross-examination, which strikes so suddenly that fiction can never endure it.

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Another decisive reason against this mode of Trial, is, that there is no compulsory method of forcing men to swear Affidavits; so that if a person were obliged to prove the truth of his Return by Affidavit, he is totally destitute of any means of obliging men to make Affidavits to prove them.

Another reason is, that the Parties are entitled to no Costs upon the Return to a Habeas Corpus; and if the Court pronounces a wrong Judgment upon the Facts, there is no method of controverting it. But in an Action for a false Return, Witnesses may be compelled to appear, and must be examined "viva voce." Costs will follow the event of the Trial. If the Verdict is false, or contrary to Evidence, the Law has established a legal method of controuling it.

Writs of Mandamus stood exactly upon the same foundation. They are both the King's mandatory Writs, issued at the instance and for the relief of the Subject. The Answer to them shall be taken to be true, till it has undergone that examination which the wisdom of our ancestors has established for the decision of Facts. And the Law gave such credit to Returns of these Writs, that they would not ever suffer the Facts to be denied and brought to Trial before a Jury in that course of Proceeding. "You have asked a Question; you shall take the Answer as it is given you: if it is insufficient in point of Law, the Judges will give instantaneous Relief; if it is false in Fact,

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Fact, you have received an injury; vindicate yourself against that injury by an Action, and when you have proved the Fact to be false, you will be entitled to a complete Relief."

This Rule was adhered to so strictly, that even in the case of annual Offices in Corporations, where the Offices would expire before the truth or falsity of a Return to a Mandamus could be tried in an Action for a false Return, the Law would not suffer the Return to be traversed.

In 9th Queen Anne, an Act of Parliament was obtained, to permit the traversing Returns to Mandamus's for such Offices as are within that Act; and all Offices, not within that Act, stand as they did at the Common Law; and the Facts, though ever so false, cannot be disproved but in an Action for a false Return, or in some Cases by an Information.

This is a strong Parliamentary Declaration of what the Law is, upon Returns to Writs of Mandamus, which are always considered as standing upon the same foundation as Returns to Writs of Habeas Corpus.

I have looked through the Books as carefully as I can, and so far from finding an instance of their being controverted by Affidavit, where a person has been in custody of an Officer under a legal Authority, there is not an instance where the Party is let in upon the Record of the Return to traverse any of the Facts contained in it; but if that might have been done, yet it does not contradict my assertion, because a Traverse carries it to its proper manner of Trial, a Trial by Jury.

There are two Cases, King and Gardiner, Cro. Eliz. 821. Trem. 354. Swallow and the City of London, 1 Syd. 287. where Facts, consistent with the Return, have been let in to be averred: I will
cite

cite them, because they shew that even Facts, confessing the Truth of the Return, and avoiding it, must go to the Jury.

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A Bailiff going to arrest a Justice of the Peace, he carried with him a hand-gun: the 33 Hen. VIII. prohibits all persons from carrying such weapons. The Justice sends out his servant and apprehends him for carrying this hand-gun; the Justice convicts him upon the Statute for the penalty, and sends him to gaol till he paid the penalty. Gardiner brings a Habeas Corpus, and removes himself into Court. The Return was the Warrant of Execution, where the Fact of his being a Sheriff's Officer did not appear; but the matter being disclosed to the Court, it was thought to be no offence, and that a minister of Justice might carry a hand-gun. How was it to be come at? This was a Fact which did not contradict the Return, but confessed and avoided it; and yet the Court would not interpose by Affidavit: they ordered a Plea to be put in, comprising the whole matter, and upon the King's Coroner and Attorney confessing the Plea, the man was discharged. But if it had been controverted, the Plea put it into such a method, as would bring the Fact to that form of Trial, which the Law has established as the best for investigating Truth.

In the other Case, Swallow was committed by the Court of Aldermen to Newgate, for refusing to accept the Office of Alderman, to which he had been elected by the Ward where he lived; he was brought up by Habeas Corpus; after the Return filed, it was moved for him to have leave to plead to the Return, that he was an Officer of the Mint, and by Charter exempt from all Offices—not a hint at an Affidavit, and they put him to a Writ of Privilege, besides the Plea; and as Facts confessed and avoided the Return, it was admitted:.

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mitted: but still it brought the point to Trial by Jury; and it was agreed in that Case, that matter, contrary to the Return, could not be pleaded, but the Party is put to his Action for the false Return.

It appears by Sir G. Treby's Report, February 1688, that the House of Commons came to Twenty-eight Resolutions, to be carried into the Bill of Rights. Many of them were afterwards dropped, and amongst the rest, the Twenty-fifth, which was, "That the Subject should have liberty to traverse Returns to Writs of Habeas Corpus and Mandamus."

This doctrine is echoed through all the Books for three or four hundred years together. Y. B. 9 Hen. VI. fol. 44. Babington, who was then Chief Justice; "If the Cause appear to us sufficient in itself, notwithstanding it be false, it is enough for us upon the Return, which the whole Court agreed. And if he had returned that he was his Villein, this shall not make an Issue here, whether he be his Villein or not: wherefore, if you cannot prove but that the cause is sufficient in itself, he shall be sent back again." 11 Coke 99. Bagges's Case. 12 Coke 129. Hawkeridge's Case: "that upon an insufficient Return, the Party must be bailed or discharged; otherwise, if Return shall be sufficient, when it is false." Godbolt, 129. If the Return is false, the Party cannot be delivered. 8 Co. 127. b.

I find no Authority which warrants a difference between Returns, when filed to Writs of Habeas Corpus in Cases of private custody, and of public custody, where the Facts justifying the Imprisonment have been set forth; that is, where there has been a full, complete, sufficient Return.

For as to Returns of Process, which are to bring Parties into Court, in order to have the Right tried and examined, when the Court is proceeding

proceeding not "legem dicere," but only "fistere in judicio." The Court often proceeds in a summary way upon such Returns for the expedition of Justice; the Court will not see their Process disobeyed and eluded by tricks and falsties; and the Case of Emerton and Viner, which was in Hilary Term, 26 and 27 Car. II. and Easter and Trinity Terms, 27 Car. II. seems to have proceeded upon this principle. It is reported in 3 Keb. 434. 447. 470. and 504. 2 Lev. 128. Freeman, 389. 401. 522.

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I will state the Case particularly, as it appears upon the Record. In Hilary Term, 26 and 27 Car. II. a Habeas Corpus issued to Sir Robert Viner, Lord Mayor of London, for the body of Bridget, the only daughter and heir of Sir Thomas Hyde. (Note, Sir Robert Viner had married Lady Hyde, the mother of Bridget, who was then dead.) In the same Hilary Term, an "alias" Habeas Corpus issued under the penalty of £. 40.; and afterwards in the same Term, a "pluries" Habeas Corpus issued under the penalty of £. 500.

Sir Robert Viner to the "pluries" returned, that Bridget, the only daughter and heir of Sir Thomas Hyde, Knight, mentioned in the Writ, at the time of the receipt of the aforesaid Writ, or ever afterwards to that time, was not in his custody, as by the said Writ is supposed; and for that reason he could not have the said Bridget before the King at the day and place mentioned in the Writ, as by the said Writ he was commanded.

A Rule was then made that the Return should be filed, and Counsel be heard thereupon the next day. Upon that next day, the day after was given to Sir Robert Viner's Counsel to speak to the Return, and upon that next day, which was Saturday, this Rule was made. "Upon the undertaking of Mr. Jefferys, as Counsel for Sir Robert

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Viner,

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Viner, upon the Writ of Habeas Corpus for the body of Bridget Hyde, that the said Robert Viner should bring the said Bridget into Court on Wednesday next, it is Ordered, that no Procefs in the mean time should be made out thereupon againft the said Sir Robert Viner."

Upon the Wednesday, the following Entry was made: " Bridget the only daughter and heir of Sir Thomas Hyde, Knight, being brought here into Court, in the custody of Sir Robert Viner, Knight, denied to remain in the custody of the said Sir Robert Viner." Upon the Friday afterwards, which was either the last day of the Term, or very near the last day of the Term, the following Rule appears to have been made: " It is Ordered, that Sir Robert Viner, before the end of next week, shall bind himself before the Justices of this Court, or one of them, in a Recognizance of £. 40,000. upon condition that the said Sir Robert Viner, before the end of the next week, between the entering into that Recognizance, and one month next after Easter then next ensuing, should not, directly or indirectly, cause or procure, or knowingly consent, that the said Bridget, then being in the house of the said Sir Robert Viner, should be married or contracted in marriage with or to any person whatsoever, or should be solicited in order to marry with any person whatsoever, or should be delivered into the hands or custody of any person whatsoever, out of the custody of the said Sir Robert Viner; and if the said Sir Robert Viner shall not enter into such Recognizance before the end of the next week, then let a Writ of Attachment issue against him for a Contempt: and it is further Ordered, that the said Sir Robert Viner shall permit Lady Acheson, the godmother, and the uncles and aunts of the said Bridget, and the sons and daughters of the said

faid uncles and aunts (except John Emerton, one of her coufins) to have accels to her, in order only to vifit her, every Monday, Wednefday, and Friday, in every week, between the time of entering into the faid Recognizance and one month next after Eaſter, between the hours of four and ſeven in the afternoon: and it is further Ordered,” by the conſent of Counſel on both ſides, “ that the ſeveral Affidavits now delivered here into Court, of and concerning the faid Bridget, ſhould be filed here in Court upon Record.” No Affidavits are mentioned or taken notice of in any of the ſubſequent Rules.

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Theſe are all the Rules which appear to have been made in Hilary Term; but Emerton brought an Ejectment in that Hilary Term, upon the Demife of himſelf and Bridget his Wife, for a meſſuage and ſome lands in North Mymms, in the County of Hertford, in order to eſtabliſh his marriage, and that Ejectment appears by the Record to have been tried upon Tueſday next after five weeks from the Feaſt of Eaſter; and after this Trial at Bar, by which Mr. Emerton eſtabliſhed his marriage with Bridget Hyde, and upon the very ſame day of the Trial, a Habeas Corpus iſſued to Sir Robert Viner, teſted 11th May, to bring up the body of Bridget, the Wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, returnable on Friday next after the Morrow of the Aſcenſion; then an “alias” iſſued, teſted 14th of May, and then a “pluries” iſſued, teſted 15th May; and to all theſe Writs of Habeas Corpus Sir Robert Viner made the ſame Return, which was, “ that Bridget, the wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, in the ſaid Writ mentioned, at the time of the receipt of the aforeſaid Writ, or of any

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other Writ of the King to him directed, or ever afterward to this time, was not, nor yet is, in his custody, as by the said Writ is supposed, and for that reason he could not have the said Bridget at the day and place mentioned in the said Writ, as by the said Writ he was commanded." And upon the same day that these Writs were returned, it was Ordered, that the Returns should be filed; and it does not appear that there were any other Proceedings on those Returns in that Term.

But in the beginning of Trinity Term, there appears to have been a Rule made in the following words: "It is Ordered, that unless Sir Robert Viner shall immediately permit William Emerton and Owen Davies to see Bridget, the wife of John Emerton, the son of the said William Emerton, or shall give notice to the said William Emerton and Owen Davies, where the said Bridget now is, that the said Robert Viner should attend the Court to-morrow;" and the next day, which was Saturday, a Rule was made, "that the said Sir Robert Viner do attend the Court on Tuesday next without any further Notice." But upon the Monday a Rule was made, whereby "it was Ordered, that the said Sir Robert Viner should attend the Court on Wednesday next peremptorily."

Upon the Thursday afterwards, "it was Ordered, that Sir Robert Viner should attend the Court the next day, and that Mr. Francis Woodward, one of the Officers of the Court, should give him Notice of the Order." Upon that next day, which was Friday, a Rule was made, "that Sir Robert Viner should attend the Court upon the day after, to inform the Court where Bridget Emerton, wife of John Emerton, then was; otherwise a Tipstaff should take him up and bring him into Court; and it was Ordered, that Mr. Barrington should attend the Court

Court the same day." Upon the Wednesday afterward a Rule was made, "that the Marshal should take up Sir Robert Viner upon the 80th day of October then next ensuing (the day after Lord Mayor's day, when he would have been out of Office) or as soon afterwards as he could take him, and bring him into Court." Early in Michaelmas Term, to wit on Wednesday after one month of St. Michael, a Rule was made, "that the Marshal should take up Sir Robert Viner on the 13th November then next ensuing, or so soon afterward as he could take him; and that Mr. Emerton and his wife, and the other relations of the said Bridget, should, in the mean time, have free access to her at all convenient times."

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By these Proceedings it appears, that the Court was proceeding against him for a Contempt in disobeying the Writ; and as Sir Robert Viner had returned, that the said Bridget was not in his possession at the receipt of any Writ, which was disproved by the Record of their own Court (for the Rules I have stated shew she was in his possession) the Fact, averred by the Return upon the Record, was falsified by Evidence of equal dignity, viz. the Records of the Court, grafted upon Sir Robert Viner's own acts and admissions.

In the next place, it does not appear by any Acts of the Court, that any Affidavits were read; for though the last Rule of Court in Hilary Term mentions, that the several Affidavits delivered into Court concerning the said Bridget Emerton, should be filed; yet it does not appear from the Records that they were ever read; and it is observable, that they were filed by consent of both Parties; and if any Affidavits were read, it could only be the Affidavits mentioned in that Rule; because no notice is taken of any Affidavit in the subsequent Rules, and consequently none could have been read to contradict the

Return.

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Return to the second Habeas Corpus, because they were made two months before the second Habeas Corpus issued.

But suppose there had been no such Proceedings upon the Record, and Affidavits had been read to shew that Bridget was in the custody of Sir Robert Viner, it would not encounter the doctrine I lay down; for it was not a Return, averring Facts justifying the cause of Imprisonment, but only an excuse for not obeying the Writ; and if it be false, the Court proceeds for a Contempt in a summary way in this Case as they would in all others. In *Godbolt*, 219. *Smith*, one of the Officers of the Court of Admiralty, was committed by the Court of Common Pleas to the prison of the Fleet, because he had made Return of a Writ, contrary to what he had said in the same Court the day before. And to bring it home to my point, I would suppose there had been no Verdict, evidencing the marriage of Bridget with Emerton, and that Sir Robert Viner had returned, that Bridget was not the wife of Emerton, but his own wife: in case there had been no legal disability, would the Court, upon Affidavits, have tried the Fact of that marriage?—If it were a Case of that nature, it had been in point—I apprehend clearly they could not, without usurping a Power which the Law has not given them.

And it is further observable in that Case, that there never was any Rule made upon Sir Robert Viner to produce her. The compulsory Rule was, that unless he should permit William Emerton and Owen Davies to see her, or give them Notice where she was, he should attend the Court.

The next compulsory Rule is, “that he should attend to inform the Court where she was, or otherwise that a Tipstaff should take him up and bring him into Court;” and the two subsequent Rules, for the
Marshal

Marshal to take him up, and to bring him into Court, were in consequence of his non-attendance.

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If they had considered the Return as duly falsified by Affidavit, and had proceeded upon that principle, they would have issued an Attachment for the Contempt in the first instance, as they had ordered in Hilary Term upon the insufficiency of the first Writ. And as Sir Robert Viner was indictable for making a false Return, the Affidavits might be properly read, as a foundation for the apprehending him; and the rather, because the marriage was established, and the Court saw he was guilty of a great Offence in secreting and withholding a wife from her husband.

Affidavits may be read to collateral purposes; as in order to bail, or adjust the sum for which Bail is to be given; and in the Cases of madmen, when they have been brought up without any formal Return at all, or only a Return, “that I have the body ready according to the command of the Writ.” 22 Aff. Pl. 56. Battery and false Imprisonment: Defendant says Plaintiff was in a rage, and did great mischief, whereupon the Defendant and his other relations took him and bound him, and put him into a house, and chastised and beat him with a stick or rod.

As there was no Return of a Fact justifying the cause of Imprisonment, the Judges were at liberty to look into it, and read Affidavits, to direct them what to do upon it. For as the Facts do not appear upon every Return, the Court, or Judge, can be enabled only from Affidavits to know whether they should interpose or not;—if satisfied the Party was mad; though under no legal custody—they would not interpose. If doubtful,—they would direct an application for a Commission, or put it into some way of Inquiry; if quite satisfied it was a scene of oppression,—they would set the Party at liberty.

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So in Cases of Wives, Children, and Wards—all the Court, or Judge, does, is to see that the Party is under no illegal Restraint. The Law so laid down, 1 Str. 445. 2 Str. 982. The King and Smith.

In the Case of the King and Smith, Habeas Corpus was brought by the father against an aunt, for a child near fourteen; the Return was only “ready in Court.” She made an Affidavit that the uncle had devised an estate to Trustees, upon Trust to pay her a yearly sum for the child’s maintenance, and directed the money should be paid only to her; that the child had lived with her from its birth; that it was the uncle’s desire it might so continue, the father being a very extravagant person.

(a) Lord
Hardwicke.

The noble Lord, (a) who then presided in the Court, said, “the Detention being undefended, we must set the child at liberty: we can take no notice of the Justification in the Affidavit; we can determine nothing about the possession of the child: all the Court can do is to see that persons are not unlawfully confined.”

In all these Cases, the Parties have opportunities of asserting their Title at Law, and may have the benefit of a Writ of Error. If we should take upon us the summary determination of this Question, it would debar the Parties of their Writ of Error, and such other privilege as the Law has given.

The Remedies, which the Law has provided in different Cases, should not be confounded. If there are any Cases where Facts have been entered into by Affidavit, upon Habeas Corpus, yet unless there have been Returns to such Writs filed, and those Returns have set forth a sufficient Cause of the Imprisonment, and Affidavits have been read to contradict that Cause in point of fact, such Cases will not encounter the position I am now advancing.

A difference

A difference is made between the Case of an Officer and a mere private person—a difference in favour of interposing upon the Return of an Officer, rather than of a private person, because an Officer is a minister of Justice, and more under the controul of the Court than a mere stranger. If said to be a wrong-doer—that is begging the question; for it depends upon the truth or falsity of the Return, whether he is a wrong-doer.

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If a lawful Cause of Restraint is not returned, the Party will be discharged for the insufficiency of it; but the Facts, evidencing the legality, must not be presumed to be false, in order to warrant an Examination whether they be false or not.

But suppose there was a distinction between Custody by a public Officer, and a private person acting without any authority whatsoever; yet, in regard to pressed men, they are in the Custody of public Officers, acting under an authority given by Act of Parliament; they are under a necessity of receiving them; they take them as persons within the description of the Act; and if they return them to be so, they have a right to have that Fact tried by a Jury as well as any other Person. But it is not the privilege of an Officer, but of an Englishman, to have a Fact, justifying his conduct, and which he has averred upon Record, tried by a Jury.

It is said, that it is a very hard case, and that a man may be sent to the West Indies before the falsity of the Return is proved in an Action.—If there be any particular hardship, the Act which produces the Case, must provide for it.

Judges will construe the Law as liberally as possible in favour of Liberty, but they cannot make Laws; they are only to expound

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them: particular Cases must yield to the Law, and not the Law to particular Cases.

There is no difference between Facts in a Return, and any other Facts averred upon Record.

Suppose an Action brought upon a Bond for any given sum of money, and the Party is arrested upon it, and he pleads that he never executed the Bond; suppose he could shew by Affidavits ever so clearly, that he did not execute the Bond, or, by a copy of the Register, that he was not born when it is dated. The Court could not interpose; why? Because the Law says, the Fact must be tried by a Jury: the Judges have no more Cognizance or Power to try it than if they were not Judges.

If they were to do it where there was the clearest and most undoubted Proof, they must do it in every Case: for the degree of Proof cannot alter or vary the mode of Trial, and translate the examination of the Fact from the Jury to the Judge.

If a man is arrested and in Custody, in a Civil Action, upon an Affidavit made by the Plaintiff of the Debt, the Court will not, even for the purpose of discharging him out of Custody, enter into any examination of the reality of the Debt, though there is the most clear and undoubted Proof laid before the Court of the falsity of the Demand; it must be tried by a Jury. The Court cannot look at it. We must administer justice, not as we wish the Law to be, but as it is.

Laws are framed upon principles of general utility, and adapted to such Cases as most frequently happen. Judges cannot set up natural reason against the reason of the Law—cannot dispense with the Law;
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For the sake of a particular Case, arising upon an Act which will expire with the Session, and perhaps may never be enacted again; and in a Case, where the hardship may be prevented by making a Rule upon all the Parties concerned in supporting the right to the Recruit, that he shall not be carried away till the merits are tried in an Action; or by letting him out, on Security to return, if the merits are against him: and if the Case was ever so remediless, I think we are not warranted to impeach, by Affidavits, the truth of the Return of an Officer, acting under an Act of Parliament, which the Law says ought to be impeached by a Verdict.

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But the Case is not a remediless one: by the Common Law, the Writ of "Homine replegiando" will clearly relieve him. That Writ, which is obtained out of the Court of Chancery upon an Affidavit, goes to the Sheriff, and commands him to replevy the man. If he cannot replevy him, he returns it, and a Process goes out instantly to seize the Body of the person who is supposed to have him in custody, and he is imprisoned himself till he produces the Body. Fitzherbert, Nat. Bre. 67. b. (edition 1616.) 5 Hen. 7. 3.

If a person is seized by virtue of the first Writ, and the Party, who has him in Custody, claims any right to the Detention of him, still he is to be delivered, upon giving Security for his Appearance, and to try the right in a Court of Justice; and if the point is determined against him, to deliver himself up to the person in whose Custody he was: so that, by this Writ, the Party may be instantly set at liberty, without violating any Rule of Law whatsoever; and where a person is in actual Custody, the Sheriff will be sure to find him and deliver him; and it is a more sure and certain Remedy in that Case, than where a man is imprisoned by a mere private person, and may be shifted about so secretly, that the Sheriff cannot find him.

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There is another method by which a man impressed may get at his liberty, laying the Gaoler and the Return quite out of the Case: and that is, by appealing to that summary Jurisdiction, which the Court of King's Bench exercises over all inferior Jurisdictions, Powers, and Authorities whatsoever.

The Authority given to the Commissioners, being a particular, special Authority, if it is abused, they are answerable to the Court for it; and the Court will relieve the Party oppressed by it in a summary way, by Affidavits. But in that Case, the Complaint is founded on Affidavits, and therefore must be answered by Affidavits; and the Fact is tried, between the persons who did the wrong, and the person who sustained it.

The Crown, being interested in the Recruit, is likewise heard "pro interesse." The Gaoler is no Party to that Complaint or Inquiry; and as to him, the Fact, which he has averred upon Record, stands unimpeached; and if it is false, he must and can only be answerable for it in an Action: and by this mode of Proceeding, the Party acquires such a Discharge as will completely work a manumission of him from his condition of a Soldier.

For if a Gaoler should let a man go, or return only that he had his Body ready, without shewing any Cause of his Imprisonment, or should make an insufficient Return, or a false Return; no man can say that an Act of the Gaoler can affect the right which the Public have in the Recruit. That must and can only be determined between the Commissioners and the Crown on the one side, and the Party imprisoned on the other.

The distinction, between a Proceeding by Habeas Corpus and upon Motion, I take to be this: In a Proceeding by Motion, the Court goes upon Affidavits; and it may take its rise collaterally,

various ways, out of disputes which come before the Court upon Record. For instance, the Return to a Habeas Corpus cannot be tried and set aside by Affidavits; but the Court may take the matter up "diverso intuitu," in order to grant an Information against a man who has seized another by outrage and violence, and detains him without any colour of Authority; or perhaps to proceed against such person by way of Information for a false Return, which Hale says is an indictable Offence; or in order to commit him for an outrageous breach of the Peace.

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Suppose Habeas Corpus for a Maid taken away, according to the Statute of Philip and Mary, or of 3 Henry VII.;—by the one, a great Misdemeanor,—by the other a Felony; and the Party returns that he is married, that she is his wife. The Fact, or validity of the marriage, cannot be controverted upon the Return; but upon Affidavits the Court might commit him for a Misdemeanor in one Case, and for a Felony in the other. And in Cases where the Court has a Discretion as to bailing, the Court might put such terms upon him as would force the immediate Relief of the person imprisoned and agreeable to these principles, is the King and White, Trin. 1745, where the Court would not discharge the impressed man, T. Reynolds, upon the Affidavits contradicting the Return; but being brought up on a Monday, and the Writ and Return, which was full and sufficient, being filed, the Court ordered him to be brought up again on Wednesday; and upon reading the several Affidavits of Reynolds and others on his behalf, made a Rule upon the Commissioners and the Master, to shew Cause the next day, why he should not be discharged out of the custody of the said Richard White. The Rule was as follows:

Monday,

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Monday, 1st July 1745. "The Defendant being brought here into Court, in custody of Richard White, Esquire, Major of the Tower of London, by virtue of His Majesty's Writ of Habeas Corpus, It is Ordered, by consent of Counsel on both sides, that the name Thomas White, mentioned in the said Writ, be made Richard White: And it is further Ordered, That the said Writ and Returns thereto be filed, and that the said Richard White bring into this Court the body of the said Defendant Thomas Reynolds on Wednesday next; and upon reading the several Affidavits of Thomas Kell and others, George Stewart and others, Thomas Reynolds and John Mangaar, It is further Ordered, that Thomas Bedwell, Francis Bedwell, Charles Scriven, John West, and John Robinson (Commissioners under the Act) do to-morrow shew Cause why the said Defendant should not be discharged out of the custody of the said Richard White, upon Notice of this Rule to be given to them respectively in the mean time."

There is a decisive mark upon this Rule, which shews the Court industriously avoided twisting the Complaint against the Commissioners with the Return; because they ordered the Rule on the Commissioners to come on at a different day: whereas, if the Affidavits had been levelled and pointed at the Return, the Court would have directed them to have come on together; and it is extremely material, that Major White is not so much as a Party to that part of the Rule which is upon the Commissioners; the Court considered the Return with regard to him as sacred, and not to be litigated by Affidavits against him.

If the Court had meant to have impeached the truth of the Return by Affidavits, as between Reynolds the man impressed, and White
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the Gaoler, they would have certainly given White an opportunity of supporting the truth of his Return by Affidavits.

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Wednesday. Sir John Strange for Major White, said, the Question was of great consequence to the liberty of the Subject on the one hand, and to the service of the Public on the other, and that there had not been time for him to be sufficiently prepared: he proposed therefore, without prejudice to the Question, to admit him to Bail. The Rule upon the Commissioners was discharged; and it appears that the Defendant's Recognizance was afterwards discharged.

I have searched for Writs of Habeas Corpus and Returns to them, in Queen Anne's time. There are many; eight of the persons are remanded, seven are discharged; as to some, it does not appear what was done. And in every Case where the Party was remanded, the Return appears to be good upon the face of it; where discharged, insufficient upon the face of it.

I directed a search to be made for Affidavits, or for any Rules that might have been made upon the discharge or remanding of the Parties. The Affidavits were stolen many years ago out of the Office; and there are no Rules to be found in the Rule-Book except one, in Bolton's Case, which I will mention by and by, and submit to your Lordships, as the most decisive Instance which can be produced, that the Return was sacred, and could not be touched but by consent.

As no more light could be got from that Inquiry, I then examined the Returns where the Parties were remanded and where they were discharged; and if I could have found two Returns in the same words, one where the person was remanded, and another where he was discharged,

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it would have afforded a very strong reason to have believed that some extrinsic collateral Evidence had been received, which had produced a Remand in the one Case, and a Discharge in the other; but as all the Returns where the Parties were remanded are sufficient, and all the Discharges are in Cases where the Returns are insufficient, it demonstrates most clearly to my satisfaction, that the Court proceeded only upon the sufficiency or insufficiency of the Return, on the face of it.

There is one Return of an enlisted Soldier, Alexander James, committed by the Captain to the Savoy, plainly insufficient. The Captain is not stated to have had any Authority to commit, and no offence is stated for which the Soldier was committed; he is not so much as said to be a Captain of the regiment in which he was enlisted.

The Case of Bolton is in Hil. 3d. of Queen Anne. A Rule (a) was made by consent to refer it to Arbitrators, to determine whether he was such a person as was within the description of the Act. If the Court could have discharged upon reading Affidavits, why put it into any other mode of Enquiry? They saw it could be done only by Action
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(a) Die Merc. &c. S. Hill. Anno 3^o Annæ Reginæ. Nicolaus Bolton ductus fuit iterum hic in Curia supra Breve de Habeas Corpus ad subjiciendum, &c. sub custodia Jer. Mahone generosi; Et Ordinatum est, "ex assensu ambarum partium," quod referetur Arbitrio & finali determinatione Wilhelmi Harvey, armigeri, Carew Harvey alias Mildmay, armigeri, & Thomæ Dawtry, armigeri, tribus Justiciariis Pacis Com. Effex conjunct. cum Johanne Green, Servient. ad Legem, Johanne Wroth, arm. & Wilhelmo Stane, arm. tribus aliis Justiciariis Pacis Comitatus. predicti. Utrum predicti. Nich. Bolton, sit talis persona, qualis per Actum Parlamenti, intitulat. "An Act for raising Recruits for the Land Service," &c. secundum formam Acti predicti. intens. est retineri, Anglice, "to be entertained" in servitio Dominæ Reginæ; quodque dictus Jeremias Mahone ducat predictum Nich. Bolton, personaliter coram Justic. predicti. ad tempus et locum appunctuat. pro assemblatione Justic. illorum: et si appareat Justic. predicti. vel majori parti eorum supra examinationem quod predicti. N. Bolton, sit talis persona ut presertur, tunc predicti. N. Bolton remittatur custodiæ predicti. J. Mahone, aliter exoneretur e custodia per Justiciarios predictos.

for a false Return; but upon Consent, they might have directed an Issue to try, or fixed upon Referees, who are a Jury of the Party's own choosing, to try whether he was within the Act or not: it is nothing more than if the Parties, upon a Return to a Mandamus, should agree to refer the Fact to Referees, instead of going to Trial by a Jury: it is so far from proving, that the Court could try the question by Affidavits, it proves that they could not; and that inference is strengthened by seeing no traces of such an examination. There is no mention of it in any books of that time; and it is not to be conceived that it should by accident have happened, that all the men, remanded upon good Returns, had no Evidence, and that all the persons discharged, had.

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I am clearly of Opinion that Judges are not bound down by any Facts set forth on a Return, if disproved by a Verdict; but that the Court can look at no other Proof, as to any Facts averred on a Return, admitting and justifying the Imprisonment.

The other Judges delivered their Opinions "feriatim" on the same Questions, the 25th, 26th, and 30th May 1758; and on the 2d June,

It was ORDERED, That the Bill, intituled, "An Act for giving " a more speedy Remedy to the Subject upon the Writ of Habeas " Corpus," be

REJECTED (a).

(a) Lords Journals, 29th Vol. p. 353.

OPINIONS AND JUDGMENTS, BY

ALLEN EVANS, Esquire, - - - - - }
 AGAINST } IN ERROR.
 Sir THOMAS HARRISON, Knight, Chamberlain of London, }

COMMISSION OF ERRORS.

In the COURT of SAINT MARTIN-LE-GRAND.

Sir THOMAS PARKER, Knight,
 Sir MICHAEL FOSTER, Knight,
 The Honourable HENRY BATHURST, and
 Sir JOHN EARDLEY WILMOT, Knight,

Judges appointed by a Special Commission of Errors, to inspect
 the Judgment of the Sheriff's Court, and the Affirmance thereof
 in the Court of Hustings, at the Guildhall of the City of
 London; and if there should be any Error therein, to correct the
 same.

Sir JOHN EARDLEY WILMOT.

5th July 1762.
 Evans, against
 Harrison.

THIS Cause comes before this Court, by a Writ of Error brought
 by the Defendant in the original Action, to reverse a Judgment in
 the Court of Hustings, affirming a Judgment given in the Sheriff's
 Court against him, for the Sum of Six Hundred Pounds, supposed to
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have been forfeited by him, for the breach of a Bye-Law made by the City of London.

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Harrison.

And the Declaration states, that the City of London is and immemorially hath been an ancient City and County of itself, and that the County of Middlesex immemorially hath been and is an ancient County.

That the citizens of the said City are, and immemorially have been, a Body Corporate under different names; but now are, and at the time of making the Bye-Law afterwards mentioned, were incorporated by the name of the Mayor and Commonalty and Citizens of the City of London.

That the Sherifalties of the City of London and County of Middlesex are and immemorially have been ancient Offices, and that within the City of London, there now are and immemorially have been two Sheriffs of the City of London, annually elected, chosen, and appointed, which said two Sheriffs jointly are and constitute, and for three hundred years and more before the making the Bye-Law afterwards mentioned, were and constituted one Sheriff of the County of Middlesex, and have as well exercised the Office of Sheriffs of the City of London, as the Office of Sheriff of the County of Middlesex.

That by a Bye-Law made in the Common Council of the City, the 7th April, 21 George II. it was Ordained, that the right of electing to the Office of Sherifalty should be vested in the Liverymen of the several Companies of the City, to be assembled at the Common Hall of the City, held in Guildhall, and that the general day of Election should be the 24th day of June; and if any person or persons elected should refuse to conform to the Bye-Law, or die, or be removed, or there should be cause upon any other occasion to proceed

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to a new Election, then it should be lawful for the Liverymen to proceed to such new Election, at such day and time as should be appointed by the Court of the Lord Mayor and Aldermen. And it was Ordained, that every person elected, either upon the general Election day, or between the general Election day, and the 22d day of September following, when there should be no actual vacancy in the Office, should take the same upon him on the Vigil of Saint Michael the Archangel next following his Election, and hold the same for one whole year from thence next ensuing.

And it was thereby further Ordained, that from thenceforth it should be lawful for the Lord Mayor, between the 14th day of April and the 14th day of June in every year, to nominate in the Court of the Lord Mayor and Aldermen, one or more fit and able person or persons, not exceeding nine, being free of the City, to be put in Nomination for the Office of Sherifalty, to the Liverymen to be assembled for the Election; and the person or persons, so nominated by the Lord Mayor, should be put in Nomination to the Liverymen until they should be elected or discharged from such Nomination; and if any person so nominated by the Lord Mayor should, within six days after notice thereof, pay to the Chamberlain of the City £. 400. and twenty Marks, for the maintenance of the Ministers of the several prisons within the City, then such person should be discharged from such Nomination, and from serving the Office of Sherifalty, unless he should afterwards take upon him the Office of an Alderman; and no freeman of the City, nominated or elected to the said Offices, was to be discharged from such Election or Nomination for insufficiency of wealth, unless he should take his corporal Oath before the Court of the Lord Mayor and Aldermen, that he was not

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of the value of fifteen thousand pounds, and unless six other freemen, to be approved of by the Court, should, upon their Oaths, attest their belief of the truth of what he swore. Evans against
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And it was thereby further Ordained, that every person elected to the said Offices, either upon the general Election day, or between that day and the fourteenth of September, when there should be no actual vacancy in the Office, should personally appear before the Court of the Lord Mayor and Aldermen, at the first Court after notice of his Election, and should then and there become bound to the Chamberlain of the City, by his Bond in the sum of £.1,000. conditioned for his appearing on the Vigil of St. Michael the Archangel, then next following, between twelve and three, at Guildhall, where the Court of Hustings is holden, and then and there taking the Oath of Office, usually taken by the Sheriffs of the City and County of Middlesex, upon pain that every person that should not appear and become bound as hereinbefore is mentioned, should (if an Alderman or Commoner previously nominated by the Lord Mayor) forfeit and pay, to the uses mentioned in the Bye-Law, six hundred pounds, or if not an Alderman or Commoner so nominated by the Lord Mayor, four hundred pounds; and every person who had paid any sum of Money to the Chamberlain for the use of the City, to be exempted from the said Offices, should be for ever exempted, unless he should afterwards become an Alderman, and no person who had served the said Office once, was to be chosen a second time.

And it was further Ordained, that the Penalties to be forfeited by virtue of this Bye-Law, should be recovered by action of Debt, in the name of the Chamberlain, in one of the King's Courts of Record in the City.

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The Declaration then states, that on the 30th April 1751, FRANCIS COCKAYNE, Esquire, then Lord Mayor, did, in the Court of Lord Mayor and Aldermen, duly nominate ALLEN EVANS, being a Commoner, and free of the City, and “a fit and able person,” to be put in Nomination for the Office of Sherifffalty, to the Liverymen, to be thereafter assembled for the Election; of which Nomination the said ALLEN EVANS the same day and year had due notice given him, but did not, within six days after such notice given him, nor at any other time, pay the Chamberlain four hundred pounds.

That on the 24th of June 1754, and at every assembly of the Liverymen, assembled for the Election of Sheriffs after the Nomination of ALLEN EVANS, the said ALLEN EVANS was duly put in Nomination to be elected one of the Sheriffs, but was not elected; and at an assembly of the Liverymen, held the 24th June 1754, for the Election of Sheriffs, GEORGE STREETFIELD and ALEXANDER SHEAFE were duly elected, but neglecting to appear and give such Bond as was directed by the Bye-Law, the Court of the Lord Mayor and Aldermen did Order, that the Liverymen should be summoned to assemble on the 23d July 1754, to proceed to a new Election of Sheriffs.

That at an assembly held the said 23d July, ALLEN EVANS, being “a fit and able person,” and free of the City, and not then discharged from the Nomination made of him by the Lord Mayor, nor otherwise exempted, was duly put in Nomination to the said Liverymen, and the then Sheriffs did then and there declare as the truth was, that the Election of the Liverymen was then fallen on the said ALLEN EVANS and JOHN TORRIANO, Esquires; after which and upon the same day and year, at Guildhall, and in the place where the
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Court of Hustings was usually holden, and in the presence of the deputy of the Lord Mayor (then indisposed) and six of the Aldermen, the said ALLEN EVANS and JOHN TORRIANO were declared duly elected Sheriffs of the City, and Sheriff of the County of Middlesex, for the year then next ensuing, to commence from the Vigil of St. Michael the Archangel, and proclamation was then and there publicly made thereof, and the said ALLEN EVANS and JOHN TORRIANO were called upon to come forth and give their consent to the said Office, but they did not give their consent thereto.

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The Declaration then states, that the said ALLEN EVANS had notice given him of his Election the 24th of July 1754, and that on the 30th of July 1754, the next Court of the Lord Mayor and Aldermen of the City, after the Election of the said ALLEN EVANS, and the notice given him of such Election, was held at Guildhall, where the said ALLEN EVANS appeared and absolutely refused to take upon himself the said Office, without offering any reasonable excuse for his refusal; and the said ALLEN EVANS did then and there refuse to become bound to the Chamberlain of the City by any Bond, with such condition as is required by the said Bye-Law, and the said ALLEN EVANS refused to execute such Bond, and take upon him the said Office, not having taken his Oath in the Court of the Lord Mayor and Aldermen, that he was not of the value of fifteen thousand pounds, and by reason thereof forfeited the sum of six hundred pounds, which the Declaration charges, he has not paid, and for which the Action is brought.

To this Declaration the Defendant, ALLEN EVANS, has pleaded an Act of Parliament, made in 1661, intituled, "An Act for the well governing and regulating of Corporations," by which, after many
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temporary provisions not necessary to state, it was enacted, " that no person or persons should be placed, elected, or chosen in or to any of the Offices or Places mentioned in the Act (comprising the said Office of Sheriff) that should not have, within one year next before such Election or Choice, taken the Sacrament of the Lord's Supper, according to the Rites of the Church of England; and that every such person or persons so placed, elected, or chosen, should likewise take the three Oaths, and subscribe the Declaration mentioned in the said Act, at the same time when the Oath for the due execution of the said Places and Offices respectively should be administered; and in default thereof, every such Placing, Election, and Choice, was and is by the said Act enacted and declared to be void."

And the Defendant further pleaded another Act of Parliament, made in the first year of Will. and Mary, intituled, " An Act for exempting their Majesties Protestant Subjects Dissenting from the Church of England, from the Penalties of certain Laws;" setting forth, " that for as much as some ease to scrupulous consciences in the exercise of Religion might be an effectual means to unite their said Majesties Protestant Subjects in interest and affection," it is enacted, " that several penal Laws (particularly mentioned in the Act) should not extend to any person or persons dissenting from the Church of England, that should take the Oaths and subscribe the Declaration mentioned in the said Act, before the Justices of the Peace at the general Sessions of the Peace to be held for the County or Place where such person should live." The taking which said Oaths, and subscribing the Declaration, were to be registered in the Court of Quarter Sessions. And it was thereby further enacted, " that every person or persons, who should take the said Oaths, and subscribe the
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said Declaration, should not be liable to the Penalties in two other Acts mentioned in the said Plea; and all places of religious worship were to be open, and the Laws, provided for frequenting Divine Service on a Sunday, were to be enforced against all persons, except such persons as should come to some place of religious worship limited by that Act; and all places of religious worship were to be certified to the Bishop, or Quarter Sessions, or to the Justices at the General or Quarter Sessions, and to be registered in the Bishop's Court, or to be recorded at the Quarter Sessions.

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The Plea then avers, that the two Sheriffs, on the 24th of September 1661, were, and from thence hitherto have been and still are, persons bearing an Office, Place, Trust, and Employment relating to and concerning the Government of the City of London; and that the Defendant at the time of the supposed Election, was, and for the space of fifty years and more then last past had been, and ever since hath been, and still is, a Protestant Subject of this Realm, Dissenting from the Church of England, and a person of a scrupulous Conscience in the exercise of Religion; and during all that time hath frequented and still doth frequent Divine Service on the Lord's Day, commonly called Sunday, and for that purpose during all that time hath come to, and still doth come to some Congregation or Assembly of Religious Worship amongst Protestant Dissenters, from time to time during all that time, allowed and permitted by the said Act.

The Plea then states, that ALLEN EVANS took the Oath and subscribed the Declaration according to the directions of the said Act; on the 21st May 1751, in the Sessions held for the County of Middlesex, where he then lived; and that his taking the said Oaths and subscribing the said Declaration, are duly registered and recorded in

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the said Court of Sessions, and that he had not, one year before his Election, taken the Sacrament of the Lord's Supper, according to the Rites of the Church of England, nor has he ever taken, nor could he at any time in conscience, take the same, nor was he in any ways bound by Law to take the same at any time since the 21st day of May 1751, of which premises the Court of the Lord Mayor and Aldermen held the 16th day of July 1754, and the Liverymen assembled the 23d of July 1754, and the Court of the Lord Mayor and Aldermen, held the 30th of July 1754, had Notice; and by reason thereof, and by force of the Act of Parliament "for the well governing and regulating of Corporations," the Liverymen, assembled on the 23d of July 1754, were prohibited from electing, and had no power to elect him to be one of the Sheriffs of the City, and he then was disabled from and utterly incapable of being elected one of the said Sheriffs, and the supposed Election of him was and is void.

To this Plea the Plaintiff hath replied, that by an Act of Parliament made in the 5th year of King George the 1st. intituled, "An Act for quieting and establishing Corporations," It was enacted, "that all and every of the then member and members of any Corporation within this Kingdom, and all and every person and persons then in actual possession of any Office," that were required by the therein recited Act, made in the 13th year of King Charles the 2d. intituled, "An Act for well governing and regulating of Corporations" (in the said Plea of the said ALLEN EVANS above-mentioned) to take the Sacrament of the Lord's Supper, according to the Rites of the Church of England, within one year next before his Election or Choice into such Office, should be and were thereby confirmed in their several and respective Offices and Places, notwithstanding their omission

omission to take the Sacrament of the Lord's Supper as aforesaid, and should be indemnified, freed, and discharged of and from all Incapacities, Disabilities, Forfeitures, and Penalties, arising from such omission, and that none of their acts, nor the acts not then avoided, of any who had been members of any Corporation, or in actual possession of such Offices, should be questioned or avoided for or by reason of such omission; but that all Acts should be and were thereby Declared and Enacted to be as good and effectual as if all and every such person and persons had taken the Sacrament of the Lord's Supper in manner as aforesaid; nor should any person or persons who should be thereafter placed, elected, or chosen in or to any the Offices aforesaid, be removed by the Corporation, or otherwise prosecuted for or by reason of such omission, nor should any Incapacity, Disability, Forfeiture, or Penalty, be incurred by reason of the same, unless such person should be so removed, or such Prosecution be commenced within six months after such person's being placed or elected into his respective Office as aforesaid.

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To this Replication the Defendant has demurred, and the Plaintiff has joined in Demurrer.

Judgment was given for the Plaintiff in the Sheriffs Court, and a writ of Error being brought in the Court of Hustings, the Judgment was there Affirmed; and it now comes before this Court by a Writ of Error, and the Plaintiff in the original Action having pleaded "in nullo est erratum," the Cause has been now argued three times, and stands for the Judgment of this Court.

There are two general Questions:

The 1st. is, Whether the Declaration is not insufficient, because it does not state that the City has any right, either by Charter or Pre-

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scription, to elect the Sheriffs; that the Bye-Law being made to regulate this Franchise, it ought to appear upon the Declaration that they are entitled to the Franchise, which can only be by Charter or Prescription; but as this Cause has been long depending, and the great Question in it has been much agitated, and it is high time that it should be settled, we have been very desirous to determine this Cause upon its real merits; and, as we are all of the same Opinion upon the merits, and are desirous that our Judgment should be considered as founded upon the merits only, unmixed with any other ingredient whatsoever, we shall not give any opinion upon this Objection to the frame of the Declaration; so far I will say, that I think there is great weight in the Objection, and I am persuaded the City will not be advised to adopt this Declaration as a Precedent.

The 2d, which is the great Question in this Cause, is, Whether the Plaintiff in the original Action, under all the circumstances disclosed by the Pleadings, is entitled to recover the Penalty of £. 600, imposed upon the Defendant, for refusing to comply with that part of the Bye-Law, stated in the Declaration, which directs that every person elected to the Office of Sheriff, shall appear before the Court of the Lord Mayor and Aldermen, at the first Court after notice of his Election, and become bound for his appearing and taking the Oath of Office upon the Vigil of St. Michael then next following: And I am of Opinion, that the Plaintiff is not entitled to recover, and that the Judgments, which have been given in this Case, ought to be reversed.

This Case has been very ably and learnedly argued at the Bar, and several positions laid down, which are clear and indisputable.

1st.—It is clear that, of common right, there is a power inherent in all Corporations to call upon their members for the performance of all corporate Duties.

2d.—That

2d.—That the execution of Offices is one of those Duties.

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3d.—That the Power of making Bye-Laws is incident to every Corporation.

4th.—That a Bye-Law, imposing a reasonable Fine for the refusal of a corporate Office, is a good Bye-Law.

The Counsel have differed a little in their notion of the nature and quality of this Fine: the Counsel on one side call it a Punishment, and those on the other side a Satisfaction by way of Damages. I think it rather participates of Punishment than of Satisfaction. In respect of the Corporator, it is certainly a Punishment, for the violation of a Law which he hath contracted to obey: for the right which every Corporation has to command their members, and the correspondent obligation which their members are under to obey, arise from the Contract which they virtually make with the Corporation upon their admission into it.

The Corporation stands with regard to Penalties, for the breach of Bye-Laws, in the same situation as the King does with respect to Penalties for the infraction of Acts of Parliament, “*creditor pœnæ*,” as he is called in 1 Raym. 213.

There is another position which I take to be equally clear with any of the former; and that is, that the right which every Corporation has of calling upon their members to execute corporate Offices, may be abridged either by themselves, or by the general Law of the land; and that brings this point to its true criterion, whether that right hath not been abridged in the present Case, and what will be the legal consequence of such an Abridgment.

The unhappy situation which the Royal Family and the Nation had been in for many years before the Restoration, made the Legislature

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lature very anxious to guard against relapses; and as a very large portion of Government is delegated to Corporations, they thought it would be necessary, not only to rectify the irregular and arbitrary acts which had been done in garbling Corporations, by removing some Officers and placing others, but also to provide a proper succession of Officers in Corporations for the future.

The manner of purifying Corporations, as they then stood, was by vesting an arbitrary Power in Commissioners to turn out whom they pleased for a limited time, to the 25th March 1663; and the only Test required of persons who then were in Office, or who might come into Office within that limited time, was taking the Oaths and subscribing the Declaration; and they did not require any Sacramental Qualification, because whilst the extraordinary power given to the Commissioners subsisted, there was no occasion for any other check or controul: but when that Commission determined, and they were to provide for the succession to Offices in perpetuity, then they did not rest upon the Oaths and Declaration, but measured the fitness of the man by his antecedent religious habit, and laid down the rule by which that religious habit was to be examined and determined; and that was, his having received the Sacrament according to the Rites of the Church of England, within one year before his Election. They did not propose the Sacrament as a Test to be given at or after the Election; they durst not trust to that security, because they thought the charms of Power, in possession, might induce people to give this outward and visible mark of conversion, without being really converted: they were afraid a sudden conversion, under such a temptation, might not be a sincere one; and therefore they guarded their favourite point by a very different provision, by requiring

ing that the party should have received the Sacrament, according to the Rites of the Church, within one year before his Election: not by letting him into the Office, and turning him out again, because he would not receive the Sacrament; but by shutting the door against him and never letting him in at all, if he had not received the Sacrament before his Election.

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And the intention of the Legislature is expressed in the strongest terms which the English language can afford, to effectuate such an intention. The words are these, 13 Car. II. St. 2. C. 1. S. 12. "Provided also, and be it Enacted by the Authority aforesaid, That from and after the expiration of the said Commissions, no person or persons shall for ever hereafter be placed, elected, or chosen in or to any the Offices or Places aforesaid, that shall not have, within one Year next before such Election or Choice, taken the Sacrament of the Lord's Supper, according to the Rites of the Church of England; and that every such person and persons so placed, elected, or chosen, shall likewise take the aforesaid three Oaths, and subscribe the said Declaration, at the same time, when the Oath, for the due Execution of the said Places and Offices respectively, shall be administered; and in default hereof, every such placing, Election, and Choice, is hereby enacted and declared to be void."

To whom is this Clause addressed? Not to the Party, but to the Electors: The prohibition is laid most clearly upon the persons who had a right to elect. It is the voice of the Society, commanding them not to elect persons who fall under that description; and an Election made contrary to the Prohibition, is a transgression of the

Law;

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Law; and in this Case it was a wilful transgression of the Law, because it is expressly averred by the Plea, that the Lord Mayor and Aldermen, and the Electors, previous to the Election, had notice that Mr. EVANS was one of the persons who fell under the description negatived by the Law; and if it was a wilful transgression of the Law, it is a moral wrong which can never lay the foundation of an Action to be sustained by a Court of Justice. Courts of Justice are instituted to enforce the will of the Society: the Laws manifest that will, and it is the duty of Courts of Justice, by Actions or Indictments, adapted to the nature of the Case, to carry those Laws into execution; but they are not to sustain Actions for refusing to do what the Society had forbidden; it would be acting in direct opposition to the very design of their Institution; it would be lending their assistance to contravene the will of the Society, instead of enforcing obedience to it.

The rule of the Common Law, in respect of Acts done contrary to the prohibition of the Law, is this, "*quod contra legem fit, pro infecto habetur*;" and the rule of the Roman Law, adopted by all the Laws in Europe, is, "*ea quæ Lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur; licet Legislator tantum fieri prohibuerit, nec specialiter dixerit, inutile esse debere quod factum est*;" and in this Case, the Law hath not only prohibited the Election of persons, who have not received the Sacrament within the Year, but expressly declared the Election to be void.

It is a mere idol and shadow of an Election; and, as to all legal effects, exactly the same as if the Election had fallen upon an entire stranger to the Corporation. It is impossible to be under an obligation

tion to obey, if the Party demanding obedience hath no right to command it. The Injunction not to elect, extinguishes the obligation to accept.

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This is a legal consequence, necessarily springing out of a legal principle; and though the word "void" hath upon this occasion, and upon many others, undergone very severe trials, and sometimes hath been construed to mean "voidable," and sometimes "partially and relatively void," as to particular persons, and for particular purposes; yet it must be construed in its greatest latitude and fullest extent, in respect of those persons who have done the act which the Law has forbidden.

An attempt was made to shew, that the Legislature intended a difference between the case of Officers, then in possession and refusing to take the Oaths and subscribe the Declaration, and persons who should afterwards be elected, not having received the Sacrament within a Year before the Election: that, in the first Case, the Offices are declared to be "void" to all intents and purposes, as if the said respective persons so refusing were naturally dead;" but that in the latter Case, it is only said, every such Placing, Election, and Choice, is thereby enacted and declared to be "void." The omission of the words, "to all intents and purposes, as if the persons were dead," is urged as an evidence of taking a much wider compass in the one Case than in the other.

But I can find out no different intention, from this difference of expression, as to the point now under consideration: they intended in one case to turn persons out of Power, who would not take the Oaths and subscribe the Declaration; and in the other, to keep persons out of Power, who were not of the established Church. Their intention was the same, as to the point then under consideration;

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and the difference of expression is owing to a difference between the cases of turning a man out of an Office which he had, and keeping a man out of an Office which he never had at all. The words are accommodated and adapted to the subject matter; where the Office was full, it declares the Office shall be void to all intents and purposes, as if such person was dead: it was a civil corporate Death they were inflicting upon Officers then existing; but in the other Case, they were guarding against any such existence.

And it is very observable, that the Act doth not make the Office void, but the Election void; which proves decisively they did not apprehend the Office would be filled by such an Election; if they had, they would have applied the annulling words to the Office, as they have done in the Case of Officers then in possession, and not to the Election; and though it was proper, where the Office was full, to say, it should be "void, as if the person refusing the Oaths was dead;" yet it would have been very absurd to have applied the same expressions to persons whom they had enjoined the Corporation not to create, and most inaccurate to have illustrated their meaning by a resemblance to the Election of a dead man. If they had thought any explanatory resemblance necessary, it would rather have been, as if such person had not been a Member of the Corporation, or as if such Election had never been made; but it would have been useless tautology to have added any thing; for when it says the Election shall be void, it is in effect saying that it shall be considered by the Law as if there had been no Election at all.

It was said, that the Law against Gaming makes Notes "void to all intents and purposes," and the Acts against Usury only makes them "void;" and that a Gaming Note in the hands of an inno-

cent Indorsee, would be void against the Drawer, but it would not be so in the Case of a Note given upon a usurious Contract; and it was determined in the Case of a Gaming Note, that it would be void in the hands of an Indorsee; but if that Case is right, which was then thought a hard one, I think the Law must be the same upon a usurious Note; and no Case was cited, either before or since the Case upon the Gaming Note, to establish such a distinction; and I am sure I can find out none in the intention of the Legislature, between "void," and, "void to all intents and purposes." It is only an ampliation of expression, and spreading out the same idea a little more diffusively; but they both equally mean—That the Act done shall be considered as if it was not done. But it was then very ingeniously urged, that the Law will not endure such a construction of the word "void," and that this Election cannot be void to all intents and purposes whatsoever; because a Warrant by a Sheriff, so chosen, would not subject the Plaintiff to an Action for false Imprisonment, and that a Bail Bond taken by such a Sheriff, might be assigned, and the Bail might be sued, if the principal did not appear according to the Bail Bond; and I admit the Law to be so; but it would be exactly the same if the Corporation had elected an entire stranger to the Corporation, or an Usurper had been in possession of the Office without any Election at all; for a Rule of Law interposes in this Case, viz. That the authority of a Magistrate or officer is not to be looked into by individuals subject to the Jurisdiction, nor any Inquiry made whether his Authority be lawful: Possession alone, for Public Convenience, is sufficient to substantiate all such Acts as are essentially necessary for the Administration of Justice, and which Magis-

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trates and Officers “ de jure” must and ought to perform: but for my own part, I lay very little stress upon the annulling part of this Clause; I think it is involved in the Prohibition: the principle upon which I go is, that the Election is an infraction of the Law; and right cannot spring out of wrong.

To analyse the Case more particularly—Suppose an Act of Parliament were now to prohibit the Election of unmarried men into Corporation Offices; what would be the legal consequence of such a Prohibition? It would repeal all the Bye-Laws in England, as to the persons included in such Prohibition, and place them as effectually out of the reach of the Bye-Law, as if the Bye-Law itself had excepted them. It would extinguish their eligible capacity, and in respect of Corporation Offices, would entirely separate them from the Corporation: it would work a Release of the original Contract, as to such persons; for the Contract being to execute all Offices to which the party is duly elected, a due and valid Election is a Condition precedent to the existence of the Right in the Corporation to command, and of the obligation in the Members to obey. And the present Bye-Law has some prohibitory Provisions in it: It forbids the Election of any person who has either commuted for the Office, or executed it; and if the City were to elect, contrary to that Prohibition, would the Bye-Law support them in an Action for refusing to act under such an Election? It would be making the Bye-Law contradict itself, and defeat one provision by another. And therefore, if the Clause in this Act of Parliament had been engrafted into the Bye-Law, it must have had the same effect as the Clause in the Bye-Law, prohibiting the Election of those who had executed the Office,

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or commuted for it; and it would have had such an effect, inserted in the Bye-Law; “a fortiori,” it must have the same effect in an Act of Parliament, which controuls all Bye-Laws whatsoever.

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The motive of the Prohibition, or the quality which the Law requires or rejects in the party to be elected, will not influence the legal consequences which follow the contravention of the Law: whether it be, not receiving the Sacrament, or not being married, the will of the Legislature is the same; and indeed a Non-conformist is not within the terms of the Bye-Law upon which this Action is brought; for the Legislature have said a Non-conformist is not a fit person to be trusted. The Bye-Law confines the Nomination to fit persons, therefore a Non-conformist is not an object of the Bye-Law; and if it had expressly named “Non-conformists,” I should have thought it void; because it would have directly encountered the Law of the Land, which says, Non-conformists shall not be elected. It would have laid men under contradictory and inconsistent Obligations. If they obeyed the Bye-Law, and accepted the Office, they would have been Usurpers upon the Crown, and open to a penalty of £.500, for breaking the Law of the Land: If they obeyed the Law of the Land, and refused to accept the Office, they must have been liable to the Penalty of £.400, for disobeying the Bye-Law.

It has been said, that this Act of Parliament was not made to ease Dissenters, but to punish them; that exemption from burdensome Offices will be an ease to them, and that they ought not to enjoy their Freedom at a less expence than the Members of the established Church; that, “qui sentit commodum sentire debet et onus:” That it will be giving the Act an effect which the Legislature did not intend

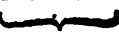
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intend it should have, and that all Acts of Parliament must be construed in such a manner as not to encounter the intention of the Legislature; that it would be most agreeable to that intention to construe the Election absolutely void as to the person holding the Office, and for his benefit, but good as to the Corporation, who call upon him for the Commutation.

And there certainly are many Cases, as I have mentioned before, where the same Act is good to a certain degree, or for some certain purpose, or to some persons, and "void" as to all others; but there never was a Case where that word was construed in such a manner as to make the Act good for the benefit of the person who had broke the Law, and void as to the person who had refused to concur in breaking it.

As to the Intention of the Act of Parliament; it was most certainly to secure and appropriate all the Power, which Corporation Offices give, to persons who, at least outwardly, professed the Religion of the state. That was the sole end, object, and aim of this Clause in the Act of Parliament: it was a Bill of exclusion from Power: it did not look after or provide for the consequences of that exclusion.

Whether those consequences would prove beneficial or detrimental to them, or whether upon the balance of the account, they would prove gainers or losers by the exclusion, was not the point the Legislature had in view; their point only was, that persons, who were not of the Religion of the State, should not be entrusted with Offices under the State; "*Nolumus res sic administrari.*" The consequence arising from this Law, was the exclusion of Non-conformists from Power, which is Punishment; but Punishment was not the end of
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the Law, but a consequence of it; and in the exposition of a Law, great care must be taken not to mistake the consequence of a Law for the end of it. Evans against
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- To attain the end of a Law, it is the duty of Judges to make an enlarged and liberal exposition of it, and to hold all Cases that are within the reason, to be within the reach of it; and therefore to appropriate all Corporation Offices to the members of the established Church, and exclude Non-conformists, Judges ought to expound the Law with the same spirit which influenced the Legislature in making it.

But it is not to be considered or construed as a vindictive Law, for any purpose whatsoever, which is not necessary to the attainment of its own end; and if this Law were to be construed in such a manner as, besides the loss of Power, which is the necessary consequence of the Law, it should also expose them to a Penalty for having lost it, it would be confounding the end of the Law with the consequence, and making it operate as a vindictive Law for transgression; whereas it was intended as a Law to direct by whom the Powers of Government should be administered in Corporations, and as a Palladium to the Constitution in Church and State.

Whether this Case did occur to the Legislature, or how they would have thought it ought to be determined, is a matter of mere conjecture.

The Act itself plays no light upon it: it does not fall within the line of view which the eye of the Legislature was then upon: different men may, very plausibly, make different conjectures as to the will of the Legislature upon this Question; but arbitrary conjecture ought never to be the basis of Judicial Determinations. It would be removing

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moving the great boundary between Judicial and Legislative Authority. If the Case did occur to the Legislature, and they had intended to make any difference between lucrative and burdensome Offices, they would most certainly have inserted a Provision in the Law for that purpose; but by making no distinction between them, they must have intended that the Rules of Law should act equally upon both, and the construction must now be the same as to both: and suppose the Question put to the Legislature upon a lucrative Office, for instance, the Office of Chamberlain or Town Clerk, in this manner; "A Bye-Law subjects a Citizen, who refuses to execute this Office, to a Penalty of £.400. Do you then intend, by disabling a Non-conformist from being eligible to this Office, to leave him open to a Penalty for not accepting it?" What must the Answer have been? "We intend to keep Non-conformists out of Power; and for that purpose we command the Corporation not to elect them. They can never be open to a Penalty for not accepting an Office to which they are never to be elected."

Suppose it was then said, "but the Corporation may perhaps elect them; and if they do, they cannot say they are not qualified, because it is an Offence, not to be qualified." If that argument had any weight with them, must not the Answer have been, "We do not intend to exclude them from Power and Profit, and at the same time leave them liable to Punishment for being excluded."

But suppose the Question put upon a burdensome Office, and the same argument made use of as has been urged in this Case, "*qui sentit commodum, sentire debet et onus*;" and it had been said, that they ought not to enjoy their freedom at £.400 less expence than the members of the established Church.

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Is not the Answer a very obvious one? The Exemption from both makes them both equal. If they were exempted from burdensome Offices only, and not from lucrative ones, there would be an inequality; but if they are excluded from both, the Rule of “*qui sentit commodum, sentire debet et onus*,” applies directly the other way: for if the members of the established Church are to have all the lucrative Offices, they ought also to take all the burdensome ones; and though a Non-conformist in that Case pays less for the enjoyment of his freedom by such an exclusion, the members of the established Church get so much more, and all the power of Government into the bargain; and upon the balance of the whole Account, the inequality produced by the exclusion, is in favour of the established Church: for besides the home-felt joy which every good man feels from serving his King and his Country, even in the popular estimate of valuable acquisitions, Power is to many the most valuable acquisition; to all it is of some value; and riches themselves are often coveted only as the means of acquiring Power, and of distinguishing their possessors in the Government. And as to Conformity to get a lucrative Office, and Non-conformity to avoid a burdensome one, I do not see how such a Case can exist: for if they are qualified to accept a lucrative Office, they are equally qualified to be charged with a burdensome one. But if the prospect of a profit to come produces Conformity, as it often does, it only shews the nature of the scruple in the individual conforming—an unreal mockery in him; it does not prove that the scruples of all other Dissenters are equally fictitious and imaginary; and it is as unjust to measure the whole Class of Dissenters by the conduct of some of their members, as it would be for them to judge of the Religion of the established Church by the Lives

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and Practices of some who profess it: and though it has been said, they can have no scruple of Conscience in paying the £. 400, whatever scruple they may have about receiving the Sacrament; it is not a scruple of Conscience which produces this Refusal to pay the £. 400, but an apprehension that they ought not to be fined for not accepting an Office to which they are not elected.

But if this Law was to be considered as a Law made to punish Non-conformists, in the proper sense and meaning of the word "Punishment," which is the evil of suffering for antecedent transgression; it must then be construed strictly, and if any doubt arise upon the extent of it, the turn of the scale must be in favour of the Delinquent; whereas the construction now contended for, is to add an additional Punishment to what the old penal Laws inflicted, and to the loss of Power, which is the necessary consequence of this Law: for however the point may be involved in words and expressions, it is in reality making this Law operate in such a manner, as to subject Non-conformists to an additional penalty of £. 400 for not having received the Sacrament.

Another Argument has been urged, that it is against a maxim of Law, that a man should disable himself, and especially when that disability arises from the Omission of a Duty which the Law enjoins; that it is not a Defence, but an aggravation of his Offence: that according to the sound construction of the Toleration Act, Dissenters were not intended to be exempted by it from any secular Duties, but only to be delivered from the Penalties which several Laws had subjected them to for not complying with some Religious Duties; and the instances of persons, who are out of their senses, not being suffered to avoid their own acts, by pleading their own disability, are

mentioned in support of that Rule. And if a natural disability, which is the act of God, is no Defence, "a fortiori," it is said, a disability arising from an Offence ought not to prevail.

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1st. I deny the Rule in the latitude and extent it is laid down; for all Pleas of Infancy and Coverture are Pleas by which Parties disable themselves. And even in the Cases of Insanity, if Insanity appears upon a general Issue pleaded, the Law will excuse them. And so it is laid down by Holt, in Skinner, 576. Fitzherbert was of a different opinion as to the Rule itself; and it does seem to be very unaccountable, that a man should be at liberty to avoid his own Act, by the Durefs of Man, and not by the Durefs of Heaven; and the reason given for it in the Books, that a man cannot know what he did when he was mad, is to me quite unintelligible; for what inconsistency is there in saying, he does not know he ever did such an act; but if he did, he was mad when he did it?

The best and the truest reason seems to be, that the Law has directed a particular mode of Inquiry for the manifestation of Insanity, and avoiding the acts of persons under that unhappy visitation. The King, as the general Curator of all such persons, is to take them under his immediate protection, and after an Office, finding the Insanity, to avoid such of their acts as he thinks proper. But in all cases of Punishment, properly so called, Insanity is always a Defence; and if a Lunatic were to be elected into a Corporation Office, he might certainly be defended against an Action for not accepting the Office by his Insanity; for it would be only shewing that he is not the object of the Bye-Law; and in 5 Mod. 421. it is expressly laid down, that Madmen cannot be chosen into Corporation Offices, but are tacitly excepted out of all Bye-Laws made to oblige an acceptance

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of them. So in this Case, when the Party shews that he has not received the Sacrament, he shews that he is not a fit person to be elected, and consequently not an object of the Bye-Law. The only difference between the Cases is, that he shews a natural Incapacity in the one Case, and a legal Incapacity in the other: and even in the Case of Lunatics, avoiding their own Acts, Lord King, Equity Cases Abridged, 279. was of opinion, that the Rule was to be understood, of Acts done by them to the prejudice of themselves. A Case was put upon a Purchase by a Papist, which is void; and yet, if he were in possession of the Estate, it is asked, could he plead this Disability if called upon to execute an Office in respect of the Tenure? And he certainly could not, because the Service follows the possession, and is a lien upon the Estate. It is a condition which follows the Land, let it be in whose hands it will, and the Law looked on the person in possession; and whether he is in by title or without title, the estate must perform the service by the person who then has it.

But then, it is said, the circumstance which renders the Party incapable of being elected, is an Offence; it is the omission of a Duty enjoined both by the Temporal and Ecclesiastical Law, and a person shall not avail himself of a Transgression of the Law, to release himself from the performance of his own Contract.

The fallacy of this Argument lies in not fixing what this Contract is: the nature and extent of the Contract must be settled with precision, before we can apply any Rule of Pleading, laid down by the Law, for avoiding it.

Now, what is the Contract?—It is a Contract to execute all Offices to which the Corporation duly elects him; and therefore, when he pleads a Fact, which shews that he is not elected, it is not
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a Plea to avoid his Contract, but it is a Plea of a Fact, shewing that he has not broken it.

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In the Case of Infanity, the Plea would avoid the Contract, from the Incapacity of the party to make it. This Plea admits the validity of the Contract, but denies the infringement of it. It is disclosing a Fact which shews that he is not elected: it is an objection to the Plaintiff's right of action. And the first thing to be considered in all Actions, is the Plaintiff's Title. If there is any radical defect in his Title, it is the province of the Judge to dismiss it out of Court, even though no objection was made to it by the Defendant; and there are many Cases founded upon that principle. If it appears the Plaintiff has broken the Law, he shall never have the benefit of the Law in the very Instance in which he has broken it; and though the Defendant may have broken the Law too, yet that will not repel the objection to Plaintiff's right of Action.

But supposing a person shall not disqualify himself by an Offence, yet, since the Toleration Act, where is the Offence in persons who bring themselves within the description of that Act? For that Act hath taken away both "reatum et poenam."

But it is then said, that the Toleration Act was not made to release Dissenters from any secular Duties, but to exempt them only from Penalties. And the 7th Sect. in the Toleration Act has been much relied upon, to shew, that a discharge from temporal Offices was then under their consideration; and that it can be carried no further than to the Offices there specified, and that it is not an absolute exemption even from them, but only enables the Parties to find a Deputy; for if that Deputy is not approved, they are still liable; and it has been very ingeniously urged, that this is an evidence the Act did not intend to meddle

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meddle with any temporal Offices but what are mentioned in that Section, and with those, only for the purposes particularly mentioned in it.

1. Now in the first place, that Clause does not relate to any Offices which require a Sacramental Qualification; and therefore it does not prove that those Offices were then under their consideration.

2. In the next place, that Clause is most apparently adapted to the Case of persons who did not care to take any Oaths at all, viz. to the case of Quakers. It was a ray of indulgence to them, guarding at the same time against that indulgence being prejudicial or injurious to other people.

But the true use and influence of the Toleration Act upon this Question is, that by extinguishing the Offence, it extinguishes the reason upon which Lord Chief Justice Holt founded his Opinion in the Case of the King and Larwood. It is a necessary consequence, resulting from the Repeal of those Laws which created the Offence.

It does not, "ex professo," interfere with Sacramental Offices, or perhaps intentionally; but when it abolishes the Offence, it removes the Objection, and puts the persons, who bring themselves within the description of the Act, into the same situation as if those Laws had never existed; and if they do not exist, it is no greater Offence in them not to have received the Sacrament, than not to be worth £. 15,000. The Election was illegal and void, but the Parties were estopped from shewing the Defect, because that Defect was an Offence in the person who shewed it; but when it ceases to be an Offence, the Estoppel vanishes, and the argument upon this Objection stands thus: The not receiving the Sacrament was an Offence, and when it was an Offence, a person could not excuse himself from paying the

the Penalty of the Bye-Law, by alledging that he had been guilty of it; but the not receiving the Sacrament by persons within the description of the Toleration Act, is now no transgression of the Law; and if it is no transgression of the Law, it is no Offence; and if it is no Offence, it is no more than shewing any other Fact which renders the Party elected not eligible. And this distinction varies the Case of Dissenters, bringing themselves under the description in the Toleration Act, from the Case of Atheists, Infidels, and persons who are of no Religion at all. And if the Law had said, that no unmarried man should be elected into this Office, there is not the least colour to say that an unmarried man, elected, might not have repelled this Action, by a disclosure of the want of that Qualification.

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As to the Amendment made by the Lords to the Occasional Conformity Bill, and the Conference upon it in 1702; both the Bill and the Conference proceeded from a Factious Party Spirit in both Houses, when Questions were started and tossed about from one side to the other, without considering the relevancy of them, but only how far they would annoy and perplex one another: and if it had been the result of the coolest and most mature deliberation, it only manifests the apprehensions of the Houses at that time, which were probably occasioned by the Case of the King and Larwood: but Parliamentary Doubts, Debates, or Conferences, ought to have no weight in directing Judicial Determinations.

As to the 5th Geo. I. it is made use of only to shew, that an Election of a person who has not received the Sacrament, cannot now be considered to be absolutely void to all intents and purposes whatsoever, because a possession for six months will substantiate it. But that Act only affects Cases where there has been six months Possession,

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fion, and is rather a Statute of Limitations, founded upon Public Convenience, to guard against the violent operation of the annulling words in the Corporation Act.

But before the six Months are expired, and even afterwards, where there has been no possession of the Office under such an Election, the operation of the former Law is not at all varied by it.

I shall be very short upon the Cases which have been cited, because I have in some part or other of what I have said, endeavoured to meet all the reasons that are to be found in any of them.

The Case of Box and Wollaston, is cited as an Authority for the Defendant in Error; but that Case could not have been determined for the Plaintiff, upon the point which it is now produced to prove; because if it had, it must have been cited and relied upon by Lord Chief Justice Holt, and Sir Giles Eyre, as a Case directly in point to support their Opinion. The Court therefore certainly expressed their sentiments in favour of the Plaintiff upon the merits, but determined against him upon some imperfection in the Form of the Replication. But if it had been determined upon the merits, still it proceeds upon the principle of not disqualifying by an Offence; and therefore does not apply to the present Case, where the Fact alledged is now no offence.

The King and Larwood is certainly no Authority in the present Case, because from all the Reports of it, it is clear the Toleration Act was laid quite out of that Case by Lord Chief Justice Holt; and it was the Opinion only of two Judges, Mr. Justice Samuel Eyre being of a different Opinion. And in 4 Mod. 274. Lord Keeper, Lord Sommers, is said to have been of the same Opinion with Mr. Justice Samuel Eyre; and it is observable from the same Book, that

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the Fine set upon the Defendant Larwood, in that Case, was five marks and no more, which shews that the two Judges who were of Opinion against him, thought it a tender Case, and were very gentle in the Punishment.

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But giving that Case all the Authority which the unanimous Opinion of a Court deserves, yet as it stands upon a reason which vanishes, like a phantom, before the Toleration Act, it can have no effect upon the present Question, except it be in favour of our Opinion—For that Case does in effect prove, that if it had not been an Offence, advantage might have been taken of the Disability. And I observe, that it is admitted in that Case by the Judges who were of Opinion against Larwood, that if one is disabled by Judgment to bear an Office, he shall be excused, “ quia judicium redditur in invitum.” If a Judgment against an individual will excuse, why shall not an Act of Parliament, which is the supreme Judgment of the whole Legislature, have the same effect?

The Case of the Mayor of Guildford and Clarke, 2 Vent. 247. is an Authority against the King and Larwood. And though the Court in that Case thought the Exceptions to the Declaration incurable, and the Book says, that so Judgment was given for the Defendant; yet they were unanimously of Opinion, that the Plea in that Case was a good Bar.

As to the Case of Sir John Read, 2 Mod. 299. He was capable of the Office at the time he was appointed to it, and had been actually in the possession of it for three Months; whereas the Defendant in this Case was not eligible into the Office at all, and never was in the possession of it.

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Sir John Read was alledging a Disability, which he had not only Power to remove, but it was his Duty to remove; but when a Non-conformist is elected into a Corporation Office, he cannot remove the Disability, because it is a Disability which precedes the Election; and his receiving the Sacrament afterwards will not remove it, and since the Toleration Act, it is not his Duty to remove it if he could.

The Case of the Mayor of Exeter and Starr, 3 Lev. 116. doth not relate to the Sacramental Qualification. Starr refused to take the Oaths and subscribe the Declaration according to the Corporation Act; and they held that a refusal of the Oaths was a refusal of the Office, and so within the Power given to them by their Charter to fine for refusing to accept of Offices; but there was no Incapacity to be elected suggested, and therefore that Case differs as widely from this Case, as being legally elected and illegally elected, differ from one another.

If it be thought just and reasonable that this Class of Men should pay £.400 a piece, for not executing Offices which they are forbidden to accept, the Law must be altered by the Legislature; for as the Law now stands, I am clearly of Opinion they are not obliged to pay it, and that the Judgment in this Case ought to be,

REVERSED (a).

(a) The Judges, Commissioners of Error, were unanimous in Reversing the Judgment of the Sheriffs Court, and the Affirmance thereof by the Court of Hustings.

A Writ of Error in Parliament was brought in 1766, for the Reversal of this Judgment of the Commissioners of Errors; and, on the 4th of February 1767, after hearing the Opinion of the Judges "seriatim," on a Question of Law proposed to them, the above Judgment of Reversal was

AFFIRMED.

A P P E A L,

Before the most Reverend Father in God THOMAS, by Divine Providence ARCHBISHOP of CANTERBURY, Primate and Metropolitan, &c. VISITOR in ordinary and Interpreter of the Statutes of the College of ALL SOULS departed this Life in the Faith, in the Univerfity of OXFORD: The Honourable Sir JOHN EARDLEY WILMOT, Knight, one of the Juftices of the Court of King's Bench; and, The Worfhipful GEORGE HAY, Doctor of Laws, Vicar General of his faid Grace:—Sitting as his Affeffors in Doctors Commons, London; prefent EDWARD RUSHWORTH, the Actuary affumed.

WOOLLEY LEIGH SPENCER,

AGAINST

The WARDEN and FELLOWS of ALL SOULS COLLEGE, OXFORD.

THIS Cause was assigned to be heard this day at the Petition of the Proctors on both fides: Greene prayed that his Grace would pronounce for the Appeal made and interposed in this behalf, and that the pretended Election of WILLIAM VYSE and JAMES POOLE, in this Cause appealed from, was and is null and invalid in Law, and that it may be fo pronounced, and that the Warden and Fellows of the faid College may be monished and compelled to admit the faid WOOLLEY LEIGH SPENCER, a true and actual Fellow of the faid

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College, as a Founder's Kinsman, and of the Blood, Kindred, or Lineage of the Founder, Archbishop Chicheley, into one of the Fellowships vacant at the time of the said pretended Election, within a competent time, to be fixed and assigned by his Grace, and to certify the same within some short time after such Admission, and that the said Warden and Fellows may be condemned in the Costs of this Suit, and compelled to the due payment thereof. Stevens prayed that his Grace would be pleased to pronounce against the force and validity of the Appeal interposed in this behalf, and would dismiss his Clients from the said Appeal, and would condemn the said WOOLLEY LEIGH SPENCER in Costs.

There were Two other Appeals, of

CARNE against the same.

WYNNE against the same.

THE Appellants had proposed themselves as Candidates at an Election for two vacant Fellowships of All Souls College. WYNNE was in the eleventh, CARNE was in the thirteenth, and SPENCER in the fourteenth Degree from the Founder; and the College had rejected their Claims, admitting their Pedigrees and their Qualifications, but insisting that Consanguinity was worn out at such remote Degrees from the Founder, and that they were not entitled to any Preference. The Appellants founded their Claim upon the following Clauses in the Statutes :

“ Insuper cum, secundum Apostolum, teneamur bonum facere ad
 “ omnes, maxime ad domesticos Fidei, Ordinamus & volumus quod
 “ in omni Electione Scholarium predictorum, futuris temporibus in
 “ dictum Collegium facienda, principaliter et ante omnes alios, illi
 “ qui

“ qui sunt vel erunt de Consanguinitate nostra & genere, si qui tales
 “ sint, ubicunque fuerint oriendi, dum tamen sint reperti habiles &
 “ idonei, secundum Conditiones superius & inferius recitatas, sine
 “ aliquo Probationis tempore, in veros dicti Collegii Socios ab initio
 “ eligantur & etiam admittantur: Quibus deficientibus, tunc illi qui
 “ sunt vel erunt de Locis vel Parochiis in quibus Possessiones et Res
 “ spirituales five temporales dicti Collegii consistant, &c.
 “ Quod omnes electos seu assumptos (his qui de nostro Sanguine
 “ duntaxat exceptis) per unum Annum in eodem Collegio stare vo-
 “ lumus, antequam in veros Socios ejusdem Collegii admittantur.”

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The Question was argued by Mr. Blackstone and Dr. Smallbrook, for the College, and by Dr. Wynne and Mr. Wynne, for the Appellants.

When the Audience was withdrawn (which Dr. Hay reported to be the Practice upon Appeals to Visitors) the Archbishop having asked Mr. Justice WILMOT his Opinion, he said,

THAT he thought it was a Question of Intention; and that if that Intention was not repugnant to Reason, Morality, or the municipal Laws of the Kingdom, it must be implicitly obeyed.

THAT a Founder was a Legislator in respect of the Society which he had created. The Statutes were a Code of Laws, by which the Society was to be governed, and the Succession regulated; and that his Grace was substituted by the Founder, in the place of his Heirs, to be the Guardian of the Founder's Intention, and in this Domestic Forum, to enforce obedience to it: that the Founder's Intention was to be collected from his words, and that he had himself laid down the Rule for expounding them, “ secundum verum literalem et grammaticalem sensum,” and that the words “ de consanguinitate genere
 “ & san-

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" & sanguine," were as general, comprehensive, and indefinite as could be found in the Latin Language, to take in all persons whatsoever, who were of the same Blood with the Founder, to the remotest generation.

THAT it was a Rule adopted by all Laws, "*quoties in verbis nulla est ambiguitas, expositio contra verba expressa non est fienda.*" That the Counsel for the College had not controverted the extent of these words in their common and popular signification; but had contended, that at the time of the Foundation of this College, Consanguinity was limited and bounded by all Laws, and particularly by the Canon Law (which was then in the highest esteem) to some certain Degree. That the Civil Law, as then understood, limited Consanguinity, according to some Writers, to the seventh, and according to others, to the tenth Degree in all collateral Successions: that the Canon Law bounded it in many instances, and, in respect of Marriages and "*Re-cusatio Judicis,*" had stopt it at the seventh; and the Common Law of this Kingdom, in Challenges to Jurors and Sheriffs, at the ninth; and that the Court of Chancery had confined a Devise "*to all Relations,*" to include only those who could take as next of Kin under the Statute of Distributions. That, by the Feudal Law, Consanguinity originally only took place in the descending Line lineally "*ad infinitum;*" and though by our Law now, it was as indefinite collaterally as lineally, yet the Law required a person, claiming by descent, to prove himself Heir, either to the first Purchaser, or to the person last seized, who was presumed to be of the Blood of the first Purchaser. That general words may be restrained, and particular words enlarged by the subject-matter, and must be expounded always according to the meaning of the person who uses them; and that the Founder must

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mean to have used them in a limited bounded sense, which they always had in a legal signification. That the tenth was the remotest degree admitted by any Law, and that Mr. WYNNE, who was the nearest, being in the eleventh degree, they must all be excluded.

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THAT he thought there was no reason to infer such an Intention from this Argument, but rather the reverse; because it was not to be conceived that so wise and learned a Prelate as the Founder (called by Lindwood, his secretary, the "lumen Legis") should not have fixed the limit to his Consanguinity, if he had intended it, when the insertion of three words, "infra decimum gradum," or any other Degree he had chosen, would have ascertained it; and as different Degrees, and different manners of computing them, had been adopted by different Laws, and even different Degrees to different purposes by the same Law, he could never mean to leave it open to construction, which of those Degrees he referred to: and as to the boundaries mentioned to have been set by the Laws in the instances mentioned, that he apprehended the Text of the Civil Law, cited by Dr. Wynne, shewed, that even in collateral Successions, "ab intestato," there was no limit, but that parties "etiam in longissimo gradu," were entitled to succeed; and though some of the old Commentators, as Azo and others, had bounded the Relationship to the seventh or tenth Degree, yet all the Writers, since the Founder's time, had been of a different opinion; and that the reason given by Azo, &c. for bounding it in the collateral Line, (viz. because it ought to be between persons who might live to see one another) applied equally to the lineal descending Line; whereas it was admitted by all Writers, at all times, that lineal Consanguinity extended "ad infinitum."

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THAT as to the Canon Law, in respect of marriages, the Prohibition, though formerly extended to the seventh Degree from lucrative motives, yet, at the time of the Founder, was contracted to the fourth; and it did not follow, that because persons were prohibited to marry within particular Degrees for particular reasons, that they were not related at all out of those Degrees: That if the fourth Degree were to be the limit, the great Grandsons of the Founder's Nephew, whom he might have lived to have seen, would have been excluded. In the instances given of the "Recusatio Judicis," and Challenges to Jurors and Sheriffs, the Laws did not say that Consanguinity ceased beyond those Degrees which limited the Objection, but that those distances removed any suspicion of partiality: That the Laws, in bounding Consanguinity in particular Cases and for particular purposes, proceeded upon a supposition that Consanguinity was infinite; because there would have been no occasion for drawing any line, if it had ceased of itself.

THAT the Court of Chancery had adopted the plan of the Statute of Distributions, in the construction of Devises "to all Relations," for the sake of certainty, and considering the Testator as meaning his next Relations, and to have said no more than what the Statute had expressed; but that the next of Kin in the remotest Degree, would be entitled to a Distribution under that Statute, and it had been so held in Mrs. Windfor's Case, cited by Dr. Wynne; and therefore a Devise "to all Relations" would take in the next Degree, if it were ever so remote. In the Feudal Law, the interest of the Vassal was originally very little: at first perhaps, at pleasure: then for Life: to sons, to grandsons, to all in the lineal descending Line; and at last to all collateral

collateral Heirs whatsoever: that in the time of the Founder, and for many centuries before, the Common Law set no bounds to Consanguinity, but gave a right of Succession to Heirs at any distance.

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THAT the Counsel for the College could not tell which Degree to fix upon; but only that the Founder must mean some of the Degrees, and desired his Grace to fix it: but if there was no Evidence of the Founder's Intention in that respect, it must be mere arbitrary Conjecture, and not sound Construction, to fix the Consanguinity to any: and though the Counsel had mentioned the tenth, yet they knew, and admitted, that Degree would as effectually exclude all the Founder's Kinsmen now existing, as a much nearer Degree.

THAT he thought there was nothing to determine his Grace's Judgment as to any boundary at all; or if the Founder must be supposed to have used the words with any legal Reference, that in a Disposition and Establishment of his Real Estate under Letters Patent from the Crown, he might with much greater propriety be supposed to use the words in the sense of the Common Law, than of any other Law whatsoever: That if the College were dissolved, the Common Law would now give the Estate of the Founder to his Heirs at Law at any distance; or if the Founder had not appointed a Visitor, the Visitation Power would now be in the Heir of the Founder at any distance: and it would be a strange exposition of those words, to deny the Preference to persons as not being of the Blood of the Founder, when in the first instance they might take the whole Estate, and in the other Case, might have sat as the supreme Judges upon this Question, because they were of the Blood of the Founder.

THAT the principal Clause in the Statutes, upon which the Question arises, "in omni Electione Scholarium predictorum futuris tempo-

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“ribus in dictum Collegium facienda,” &c. shews, that the Preference to his Relations was to accompany the Election in all times to come. The Perpetuity of the one, was as much the object of his contemplation, as of the other: they were to be commensurate and coextensive; and there is as much reason to limit the duration of the College, as the duration of the Preference he was giving to his Relations in the original Constitution of it. And it would be “maledicta expositio, corrumpens textum,” to sever, in construction, ideas which the Founder had united in his own mind; and the Oaths to be taken by the Warden and Fellows, and the Statute “de Veste,” all concur in evidencing the same Intention.

Part of the Oath to be taken by the Warden is, “Ego, A. B. juro
“quod omnia Statuta & Ordinationes hujus Collegii, ac omnia &
“singula in eisdem contenta, quatenus personam meam concernunt
“vel concernere poterunt, secundum planum literalem & grammaticalem sensum & intellectum eorundem inviolabiliter tenebo &
“etiam observabo, ac, quantum in me fuerit, teneri faciam ab aliis,
“& etiam observari, &c.”

“Item, quod Consanguineos dicti Fundatoris in veros Socios Collegii, juxta formam Ordinationis & Statuti superius editi, sine difficultate quacunque admittam, & procurabo admitti juxta posse meo.”

The like Oath, as to the Admission of Founder's Kinsmen, is directed to be taken by every Fellow, at the time of his Admission.

The Statute “de communi annua Veste” is, “Statuimus quod
“Custos & Socii universi dicti Collegii infra Regnum Anglice existentes, tam nostri Consanguinei quam alii qui pro tempore fuerint,
“erga

“*erga Festum Nativitatis Domini, annis singulis in perpetuum, Vestes de unâ & eâdem lectâ habeant, &c.*”

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THAT the Clause directing that, upon a failure of his Relations, a Preference should be given to those who were born in the Places where his Estates lay, and in default of such, to persons born within the Province of Canterbury, does not prove that he had a failure of Relations in his eye by an extension of kindred beyond any particular Degrees; but rather shews that a perpetuity of Preference was then in his mind: Relations might not offer themselves as Candidates, or might not be qualified, or his whole Family might be extinct, or the Connection incapable of being proved. In the two first events, the Provision was only a temporary one; in the last, it was the substitution of a Preference, which “must” last for ever, to a Preference which “might” last for ever; but it would be inverting the plain avowed meaning of the Founder, to suffer Locality to take place of his Blood at the remotest distance that the mind can conceive; and though nice speculative Calculations have been made to shew the quantity of the Founder’s Blood in the fifteenth Degree, and that all Affection, which is supposed to be the foundation of the Bounty, must be worn out long ago, and all Relation of Kindred extinguished, (as Lord Clarendon expresses it upon the pedigree of Lord Say and Sele, from William of Wickham) the Bounty is not confined to any particular proportion of the Founder’s Blood. It is sufficient there is any, to give it the Preference to a stranger.

THAT this Question might have existed in the Founder’s time: all persons descended from the twelfth lineal Ancestor of the Founder would have been in the same Degree with Mr. WYNNE. Suppose a person in that Degree, duly qualified in other respects, and a person

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born at a place where one of the Founder's Estates lay, had offered themselves as Candidates; and the Founder had been asked, to which he meant by his Statutes to give the preference: must not his Answer have been, "to my own Blood most certainly?" Would he have thought of computing what quantity of Blood there was in a human Body, and how much of that Blood ran in the veins of the Candidates, and then have determined the Question according to the event of that Inquiry? or would he not have said, "the least proportion of my Blood shall turn the scale against Locality, which I substitute only upon the Non-appearance of any persons of my own Blood at the Election;" and it is a mistake to suppose Affection, in the proper sense of that word, to be the foundation of this kind of Provisions, where there can be no lineal Descendants; it is rather, Reverence for Ancestors, who are the common Stocks from whence the Collaterals must all branch, than affection for individuals, never existing to the Founder.

THAT the advancement of Learning, for the good of the Public, may be the only motive of the Endowment of Colleges; and perhaps in many, was the only motive. A desire in the Founder to perpetuate his Name, and to erect the most durable monument which could be built to preserve the memory of his virtues, might very laudably co-operate with his Public Spirit: and when Provisions are made for the Founder's own Family in the Foundation, it is plain that the same principle, which produces strict Family Settlements, had some influence on his mind, in his Benefaction to the Public. That principle always affects Perpetuity; and he considered the Founder as actuated by that Principle in the giving the Preference to his Blood. It is in the nature of a Family Settlement, modified so as to be subservient to the great
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and principal object of his Munificence, the Good of the Public; wishing at the same time, that the Public might receive that Good through his own Relations, as long as he had any.

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THAT it was said, he could not have made a Settlement, which would not have left it in the power of the Family to have alienated; and therefore, as a Family Provision, it ought not to subsist "ad infinitum:" but that was a mistake, for in the time of the Founder, and for near two Centuries before, an Estate might have been settled in such manner as would have taken in all the Claimants as Heirs male of the Body of the Founder's Father, or any of his Ancestors. Fines and Recoveries were the invention of a subsequent age. As the Law then stood, a Perpetuity might have been created from any Stock the Founder had fixed upon; a very strong argument to shew he intended a Perpetuity of Preference, when he was substituting this Preference as some equivalent for his Estate, which, in the opinion of those times, might have been perpetuated in his Family.

THAT it is admitted, the Blood never wears out in the lineal descending Line: the collateral Line is as the lineal to the Founder, who could have no legitimate Children; and at a time, when Land given to a man and his Heirs, would by the Feudal Law have gone only to his lineal Descendants; yet, if an Estate was given in that manner to a Churchman, it went to his collateral Heirs, because he could have no other.

THAT much stress has been laid upon a difference between Proximity and Propinquity: that when the Inquiry was (as in Successions) who was the next Heir or next of Kin, remoteness was no objection; but when the Inquiry was, whether of Kin at all, there it must be bounded. That in case there was a class of persons in the eleventh, and another

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in the twelfth Degree, and the dispute was, who was next of Kin, it might be fixed to the eleventh, because it would not be universal; whereas, if the dispute was about Propinquity, that is, who were of Kin, it must take in all to the one thousandth Degree, unless it was bounded.

THAT it appeared unintelligible how the eleventh Degree is in any Case whatever to be considered as the next of Kin, when contrasted with a more remote Degree, and at the same time, when uncontrasted with a remoter Degree, to be considered as no Kin at all.

THAT it had been said, that there is an absolute necessity of bounding Consanguinity, because it would lead to an entire Universality: That it must multiply into millions, and would monopolize the whole Bounty of the Founder, and also other additional Bounties given by subsequent Benefactors, without any preference to the Kinsmen of the Founder: That all Benefactions of this kind are given for the advancement of Learning, and as prizes for eminent and superior abilities: That Founder's Kinsmen may be as eminent as mere strangers, but that it had been held that it was not necessary they should be equal in abilities to strangers; that a Founder's Kinsman had upon an Appeal been determined to be qualified, if he could construe a Latin Verb out of the Accidence; and that the general intention of the Founder was encountered by tying up the College to postpone great merit and abilities in their Elections.

THAT the College has no reason to object to the extension of the Consanguinity "ad infinitum," as leading to a Universality; because, when that is the case, the College may prefer any of the Candidates they please, and which seems to be the object of their wishes; and, in its progress towards Universality, the circle of Consanguinity will widen
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very fast, and consequently the more extensive their choice must be; for not being bound down to take the nearest relations, they might always elect the worthiest; and when the Blood was opposed by strangers, the Preference ought not to be given unless there was such a degree of Learning and Merit as deserved encouragement in "*Arbitrio boni viri*." An exact parity of Learning or natural parts, would be too strict a measure; but there certainly ought not to be a great disproportion; and if the whole bounty was monopolized by persons so qualified, it would be most agreeable to the Founder's intention; for he meant the advancement of Learning through the medium of his own Family in the first place, and thereby united two very laudable purposes, the good of his own Family, if they deserved it, and the good of the Public: and if subsequent Benefactors ingraft upon the original Foundation, it is an evidence they intended their benefactions should follow the plan of the original Foundation; and if they did not intend it, they should have provided against it in their Establishments; and if the College accepts the Bounty upon different terms, they must comply with them.

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THAT there was no danger of monopoly to the Founder's Family, from the great difficulties of proving Pedigrees and the many Qualifications required in the Candidates; and as to limiting any particular number of Fellowships to the Founder's Family, that his Grace had no such authority: That he was not to controul the Founder's Laws, but to execute them; and if Bishop Hooper's Decree for limiting the Fellowships in William of Wickham's Foundation was truly stated, he thought it an illegal one.

UPON the whole, Mr. Justice WILMOT was of opinion, that it was most clearly the Intention of the Founder to give a Preference
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to his Blood, “ad infinitum;” and that no boundary line could ever be drawn to the Confanguinity, but by the hand of Time, which sooner or later levels all diſtinction of Families, and obliterates every other Memorial of Human Greatneſs.

BUT he ſubmitted his Opinion to his Grace’s much ſuperior Wiſdom and Judgment.

HIS GRACE the ARCHBISHOP Pronounced for the Appeal, and that the pretended Election of WILLIAM VYSE and JAMES POOLE was void; but gave no Coſts: and Decreed the Statutes of the College to be delivered out of Court.

HOUSE OF LORDS.

JOHN Earl of BUCKINGHAMSHIRE, and MARY
 ANN, Countess of BUCKINGHAMSHIRE, his Wife, late
 MARY ANN DRURY, Spinster; JOCOSA CATHA-
 RINA DRURY, Spinster, an Infant, by her next Friend - } APPELLANTS.

DAME MARTHA DRURY, Widow - - - - - RESPONDENT.

By Indenture Tripartite, dated 5th October 1737, previous to a marriage between the Respondent, (the Mother of the Appellants, the Countess of BUCKINGHAMSHIRE, and JOCOSA CATHARINA DRURY,) and Sir THOMAS DRURY, Baronet, deceased, who was the Father of the said Appellants, and made between the said Sir THOMAS DRURY, of the first part; the Respondent, then MARTHA TYRRELL, Spinster, one of the Daughters of Sir JOHN TYRRELL, Baronet, deceased, of the second part; and JOSEPH TOWNSEND and THOMAS MATTHEWS, Esquires, of the third part: after reciting the intended marriage, it was declared and agreed, that the said Sir THOMAS DRURY should be entitled to and receive all the personal Estate and Effects, which the Respondent was possessed of or entitled to, for his own use and benefit; and that all the Lands, Tenements, and Hereditaments, then late of the said Sir JOHN TYRRELL, which should descend to or devolve upon the Respondent, during the intended Coverture, should be settled and assured in manner therein after mentioned; and also that the Respondent, in case she should survive the

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saïd Sir THOMAS DRURY, should have and enjoy a clear Annuity of £. 600, during her Life, for her Jointure, and in full satisfaction and bar of all Dower; and also in lieu and full satisfaction of any share or distributary part of any Personal Estate, which the saïd Sir THOMAS DRURY should be possessed of or entitled to, and which she should or might claim or demand, by virtue of the Statute for the Distribution of Intestates Estates; or otherwise howsoever. And Sir THOMAS DRURY, in consideration of the saïd intended marriage, and of the Portion which the Respondent was possessed of or entitled to, and which would accrue to him in case the saïd Marriage should take effect, did, for himself, his heirs, executors, and administrators, covenant with the saïd JOSEPH TOWNSEND and THOMAS MATTHEWS, their executors and administrators, that the heirs, executors, and administrators of him, Sir THOMAS DRURY, in case the Respondent should survive him, should pay her, during her life, the clear yearly sum of £. 600 half-yearly; and also that in case any Lands of the saïd Sir JOHN TYRBELL, deceased, should in anywise descend or come to the Respondent, during her saïd coverture, then Sir THOMAS DRURY and the Respondent should and would immediately thereupon convey, settle, and assure all such Lands to the use of Sir THOMAS DRURY, during his Life, Remainder to the use of the Respondent and her assigns, during her life; and after her death, to the use of the saïd Sir THOMAS DRURY, and his heirs and assigns for ever.

This Deed was executed by Sir THOMAS DRURY and the Respondent, being then an Infant under the age of twenty-one years, in the presence of ELIZABETH KELLAWAY, the Respondent's then Guardian, who was a subscribing Witness thereto. The Marriage was solemnized soon after, with the privity and approbation of the saïd

ELIZABETH KELLAWAY; and the Respondent, at such Marriage, was entitled to a Portion not exceeding £. 2,000.

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On the 20th January 1759, Sir THOMAS DRURY died intestate, being seised in Fee Simple of a Real Estate of the yearly value of £. 2,600; and he was also at his death possessed of a Personal Estate to the amount of £. 60,000 or upwards; and at his death left the Respondent, his Widow, and the Appellants the Countess of BUCKINGHAMSHIRE and JOCOSA CATHARINA DRURY, his only children and co-heiresses at Law, being both then Infants.

Soon after the death of Sir THOMAS, Letters of Administration of his Personal Estate were granted to the Respondent, and she possessed the same or great part thereof; and afterwards insisted, that as she was an Infant at the time of the execution of the aforesaid Indenture of Settlement, and at the time of the solemnization of her Marriage, she was not bound to accept the Provision thereby made for her, but that she was entitled to Dower out of the Real Estate of Sir THOMAS DRURY, and to her distributive Share of all his Personal Estate.

And therefore the Appellants, the Countess of BUCKINGHAMSHIRE (then MARY ANN DRURY, Spinster) and JOCOSA CATHARINA DRURY (both then Infants) by their next Friend, in Trinity Term 1759, exhibited their Bill in the Court of Chancery against the Respondent, stating the beforementioned particulars, and praying that an account might be taken of the Rents and Profits of the Real Estate of Sir THOMAS DRURY, received by the Respondent, and also of the Personal Estate, and the Interest and Profits thereof, and of his Debts and Funeral Expences; and that the clear surplus of his Personal Estate, after payment of his Debts, might be brought into Court, and placed out at Interest for the benefit of the Appellants,

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during their minority; that proper persons might be appointed to receive the Arrears and growing Rents and Profits of the Real Estates; and also of the Personal Estate, during the minority of the said Appellants; and that out of the Rents and Profits of such Real Estate, and the Interest and Produce of such Personal Estate, the said Annuity of £.600 might be retained by, or paid to the Respondent for the time past and to come; and that a suitable Allowance might be made for the Maintenance and Education of the Appellants for the time past and to come; and that the savings of the Appellants yearly Income, after deducting what should be so paid for their Maintenance and Education, might be from time to time placed out at Interest, and improved for their respective benefit, during their Minority.

To this Bill the Respondent put in her Answer, and thereby said, that she had possessed so much of the Personal Estate of Sir THOMAS DRURY as she was able, but that she had not received any Rents or Profits of his Real Estate; and she insisted, that as she was an Infant when she executed the said Indenture of Settlement, and at the time of her Marriage, she could not nor ought to be barred by the said Indenture, but was at liberty to make her Election, whether she would accept the said Annuity, or waive the same, and take her Dower out of the Real Estate of Sir THOMAS DRURY, and her distributive Share of his Personal Estate under the Statute; and she submitted to account, having all just allowances: and if the Court should be of Opinion she was at liberty to waive the Annuity of £.600, and to claim such rights as she was by law entitled to, in and to the Real and Personal Estates of Sir THOMAS DRURY, then she waived the Annuity, and claimed to be entitled for her Life to a third
part

part of the Real Estates, as her Dower; and also to be entitled absolutely to a third part of the clear Residue of his Personal Estate, and of the Interest and Produce thereof. But if the Court should be of Opinion, that she was bound by the said Indenture, notwithstanding she was an Infant at the time of executing the same, then she claimed to be entitled, by virtue of the said Indenture, to a clear Annuity of £. 600 per annum, from the time of the death of Sir THOMAS DRURY, payable half-yearly during her life; the first payment to be made on the 25th March 1759; and she also claimed a suitable allowance for the Maintenance of the Appellants her Daughters, from the death of their Father to that time, and also for such further time as she should maintain them.

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This Answer being replied to, Depositions were taken in the Cause, whereby it appeared that the Respondent was born on the 23d December 1716, and intermarried with Sir THOMAS DRURY, on the 11th October 1737.

The Cause was heard (a) before Lord Chancellor HENLEY, on the 27th, 28th, and 29th February 1760, and the 3d, 4th, 6th, and 7th of February, and 1st June 1761; on the last of which days, his

(a) Vide Harg. Co. Litt. 36..6. note 7. Where, speaking of this Case of DRURY v. DRURY, Mr. Hargrave says, "The points determined by Lord Northington were, 1st. " That the Statute of 27 H. VIII. which introduced Jointures, extends to adult women only, Infants not being particularly named; and therefore, that notwithstanding a Jointure on an Infant, she may waive the Jointure, and elect to take Dower. 2d. That " a Covenant by the Husband, that his heirs, executors, or administrators, shall pay the Wife an Annuity for her life in full for her Jointure, and in bar of Dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable Jointure within the Statute. 3d. That a Woman, being an Infant, cannot by any contract, previous to her Marriage, bar herself of a distributive Share of her Husband's personalty, in case of his dying intestate."

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Lordship Decreed, that it should be referred to the Master to take an Account of the Personal Estate of Sir THOMAS DRURY, come to the hands of the Respondent, and of his Debts and Funeral Expences, which were to be paid out of his Personal Estate, in a course of Administration; and his Lordship declared that the Respondent, being an Infant at the time of her executing the Indenture of the 5th of October 1737, was not barred of her Dower in the Intestate's Real Estate, nor of her share of his Personal Estate, under the Statute of Distributions; and therefore his Lordship Ordered, that so much of the Bill as sought to bind the Respondent by the said Agreement, should stand dismissed, and that the clear surplus of the said Intestate's Personal Estate, after payment of his Debts and Funeral Expences, should be divided into three equal parts, whereof one-third part was to be paid to or retained by the Respondent, as her share thereof, under the said Statute, and the other two-third parts thereof were to be invested in the purchase of Three per Cent. Bank Annuities, in the name and with the privity of the Accountant General, in Trust, in this Cause, for the benefit of the Appellants, the Countess of BUCKINGHAMSHIRE and JOCOSA CATHARINA DRURY respectively, until they should attain their age of twenty-one years, and he was to declare the Trust thereof accordingly, subject to the further Order of the Court: and if the said two-third parts belonging to the Appellants respectively, or any part thereof, had been already invested in Government Securities, the same were to be transferred to the said Accountant General, in Trust in the Cause, for the said Appellants' benefit; and he was to declare the Trusts thereof in like manner: and the Appellants were to be respectively at liberty to apply to the Court for further Directions relating thereto as there should be occasion;

caſion ; and Directions were given concerning the Allowance for the Maintenance and Education of the Appellants ; and a Receiver, who had been before appointed of the Inteſtate's Real Eſtate, under an Order made in the Cauſe, was to be continued until the further Order of the Court, to paſs his Accounts before the Maſter, and to pay one-third part of the clear yearly Rents of the ſaid Inteſtate's Real Eſtate, from time to time as the ſame ſhould be received by him, to the Reſpondent, in lieu and ſatisfaction of her Dower, and the other two-third parts of ſuch clear yearly Rents, from time to time as the ſame ſhould be received, into the Bank, with the privity of the ſaid Accountant General, to the Account of the Cauſe ; and Directions were given for placing out ſuch two-third parts of the ſaid Rents from time to time, for the benefit of the Appellants, the Counteſs of BUCKINGHAMSHIRE and JOCOSA CATHARINA DRURY ; and all parties were to be paid their Coſts of the ſuit to that time, to be taxed by the Maſter, out of the Inteſtate's Eſtate ; and his Lordſhip reſerved the conſideration of ſubſequent Coſts, until after the Maſter ſhould have made his Report.

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Soon after pronouncing this Decree, viz. 14th June 1761, the Appellants, the Earl and Counteſs of BUCKINGHAMSHIRE, intermarried, and the Cauſe having been duly revived on that occaſion, the preſent Appeal was brought to reverſe the Decree.

After hearing Counſel on this Appeal, the following Queſtion was put to the Judges by their Lordſhips ; viz.

“ WHETHER a woman, married under the age of twenty-one years, having before ſuch marriage a Jointure made to her in bar of Dower,

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Dower is thereby bound and barred of Dower within the Statute of the 27th Hen. VIII.?"

The Judges differing in Opinion, they were directed to deliver their Opinions "seriatim," with their Reasons.

MR. JUSTICE WILMOT.

THIS Question depends entirely upon the true construction of the several Clauses in the 27 Hen. VIII. Ch. 10. (a), relating to Jointures; and in order to get at that construction, it will be necessary to consider

(a) The Clauses are,—

6. "And be it further Enacted by the Authority aforesaid, That whereas divers persons have purchased; or have Estate made and conveyed, of and in divers Lands, Tenements, and Hereditaments, unto them and to their Wives, and to the Heirs of the Husband, or to the Husband and to the Wife, and to the Heirs of their two bodies begotten, or to the Heirs of one of their bodies begotten, or to the Husband and to the Wife for the term of their Lives, or for term of Life of the said Wife; or where any such Estate, or purchase of any Lands, Tenements, Hereditaments, hath been or hereafter shall be made to any Husband, and to his Wife, in manner and form above expressed, or to any other person or persons, and to their Heirs and Assigns, to the use and behoof of the said Husband and Wife, or to the use of the Wife, as is before rehearsed, for the Jointure of the Wife; that then in every such case, every woman married, having such Jointure made or hereafter to be made, shall not claim, nor have title to have any Dower of the residue of the Lands, Tenements, or Hereditaments, that at any time were her Husband's, by whom she hath any such Jointure, nor shall demand nor claim her Dower of and against them that have the Lands and Inheritances of her said Husband; but if she have no such Jointure, then she shall be admitted and enabled to pursue, have, and demand her Dower, by Writ of Dower, after the due course and order of the Common Laws of this Realm; this Act, or any Law or Provision made to the contrary thereof, notwithstanding."

7. "Provided alway, That if any such woman be lawfully expelled or evicted from her said Jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her Husband, then every such woman shall be endowed of as much of the residue of her Husband's Tenements or Hereditaments, whereof she was before dowable, as the same Lands and Tenements so evicted and expelled shall amount or extend unto."

8. "Provided

consider the manner of making Provisions for Wives upon Marriages, and for the Issue of those Marriages; and how the Law stood, both in respect of these Provisions and of Dower, before that Statute was made, and what alteration it intended to make in this species of Property.

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Before that Statute, the legal Estate of the greater part of the real property in the Kingdom was, for reasons unnecessary to be now mentioned, in the hands of Feoffees to Uses or Trustees; and when persons who were in possession, and received the Rents and Profits of those Estates, married and died, Women were not dowable of those Estates, because the legal Seisin had always remained in the Feoffees, and had never been in their Husbands.

The consequence arising from this separation of the legal and usufructuary Interest was, that Husbands provided for their Wives be-

8. " Provided also, That this Act, nor any thing herein contained or expressed, extend or be in anywise hurtful or prejudicial to any Woman or Women heretofore being married, of, for, or concerning such Right, Title, Use, Interest, or Possession, as they or any of them have, claim, or pretend to have, for her or their Jointure or Dower, of, in, or to any Manors, Lands, Tenements, or other Hereditaments, of any of their late Husbands, being now dead or deceased; any thing contained in this Act to the contrary notwithstanding."

9. " Provided also, That if any Wife have, or hereafter shall have any Manors, Lands, Tenements, or Hereditaments, unto her given and assured, after Marriage, for term of her Life or otherwise, in Jointure, except the same assurance be to her made by Act of Parliament, and the said Wife, after that, fortune to overlive her said Husband, in whose time the said Jointure was made or assured unto her, that then the same Wife so overliving, shall and may at her Liberty, after the Death of her said Husband, refuse to have and take the Lands and Tenements so to her given, appointed, or assured, during the Coverture, for term of her Life or otherwise, in Jointure, except the same assurance be to her made by Act of Parliament as is aforesaid, and thereupon to have, ask, demand, and take her Dower, by Writ of Dower or otherwise, according to the Common Law, of and in all such Lands, Tenements, and Hereditaments, as her Husband was and stood seised of any state of inheritance, at any time during the Coverture; any thing contained in this Act to the contrary thereof notwithstanding."

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fore or after Marriage, either by Feoffments made to the Uses of themselves and their Wives, under the Statute of 1 Rich. III. which enabled Cestui que Use to convey; or by limiting Uses to them by Deed; or by taking Conveyances of the legal Estate from their Feoffees to themselves and their Wives, either for Life or in Tail; and sometimes the Ancestors, or collateral Relations of the Husband, conveyed Estates to the Husband and Wife for Life, or in Tail; and being usually made to them "jointly," this kind of Provision, from thence, acquired the name of a "Jointure."

The Statute of the 11 Hen. VII. c. 20. was made on purpose to guard these Provisions, and to avoid all Discontinuances, Alienations, and Warranties made by Wives of these Estates, to the prejudice of the Issue or Heirs of the Husband: and though the word Jointure is not in the 11 Hen. VII. yet it was held 1 Leo. 261. 1 Cro. 2. that no Estate, limited to a Wife, is within the meaning of that Statute, unless it appears to have been made for her Jointure, where the Inheritance was to go to the Issue or Heirs of the Husband: and these Provisions went by the name of Estates made "*ex provisione viri*;" and from this Statute of the 11 Hen. VII. and also from the recital in the Clause relating to Jointures in 27 Hen. VIII. it appears, that these Estates were frequently limited to the Husband and Wife, and the Heirs of their bodies, and sometimes to the Husband and Wife, and to the Heirs of the body of the Wife; and the strictest Settlement which could be made at the time of passing this Act, was to limit the Estate to the Heirs of the body of the Wife, so as to bring it within the protection of the Act of the 11 Hen. VII. The Limitation to Trustees, to preserve contingent Remainders, was not then invented; and therefore, if the Estate was limited to the Husband

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for Life, Remainder to the first and every other Son of the Marriage, he might bar the contingent Remainders before the existence of Issue; or if the Estate was limited to the Husband in Tail, he might bar the Estate Tail, and the Remainders too, by a Recovery. The most that could be done, was to vest the Estate Tail in the Wife; and then it was under the protection of the 11 Hen. VII.; and it appears from the Books, that these kinds of Limitations were very frequent, sometimes of the Estate itself; but oftener of the Use; and it was more natural they should be so, because it was carrying the check upon Alienation, so anxiously aimed at by every body, as far as the policy of the Law would then endure.

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And it was usual to make these kinds of Limitations, not only upon the prospect of a Marriage, then under immediate contemplation; but Estates were settled by Ancestors, and taken upon Purchases, with Limitations to women whom they or their Sons should afterwards marry, without a view to, or so much as the knowledge of any particular Woman who was to take under it.

And I lay infinite stress upon this mode and fashion of Settlements at the time of making the Act, because it will open the true reason of giving them the quality of a Bar of Dower, and that reason will apply as strongly in the case of Infants as of Adults.

One great inconvenience accompanied these kinds of Provisions; for whether they were made before or after Marriage, if the Husband had the legal Seisin of any other Estates, either in Fee or Fee Tail, the Wife would be entitled to Dower in those Estates, and keep the Jointure too.

This inconvenience did not frequently happen, because the legal Estate and the Use were seldom in the same hand; and husbands

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had it absolutely in their power to prevent it, by putting the Estates, which they had before their Marriage, into Feoffees, and by taking all subsequent Conveyances to Feoffees, or to themselves and others jointly, so as to prevent the right of Dower from ever attaching. But when the Legislature had come to a Resolution to consolidate the Use and the legal Estate, and to unite them together to all intents and purposes, they saw very plainly, that it was necessary to make several Regulations, not only in respect of the immediate and instantaneous influence which this consolidation would have upon real Property, as between persons then married, but also as to persons who should marry after the Act was made.

From the Preamble of the Statute, it is clear the Legislature intended that one consequence arising from this union should take place in its fullest extent, and that was, in Cases, where no Settlements had been made upon Wives, “*ex provisione viri*.”

In those Cases, all Wives, present and future, were to have Dower of all the Estates of Inheritance, whereof their Husbands were seised during the Coverture. And in this respect, the Act was very beneficial to Wives. It was not an enabling Act; for it did not give a Right of Dower; but the Consolidation amplified and enlarged the fund and subject-matter of that right, by putting all their Husband's Estates within the reach of it.

It is equally clear, that where Settlements had been made upon Wives, “*ex provisione viri*,” whether they were made before or after Marriage, the Legislature intended that they should not retain the Estates given by those Settlements, and be entitled to Dower besides: and in this respect the Act was an abridgment of the Right, which the Common Law gave them, of retaining both; and another thing

thing is equally clear, that the Act leaves Widows, who were then living, exactly as it found them, entitled either to their Settlement, “*ex provisione viri*,” or to Dower, or to both, or to neither, in the same manner as they would have been, if the Act had never been made.

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When the Legislature had determined that Widows should not have both Jointure and Dower, it became necessary to determine which they should have, either to make Jointure bar Dower, or Dower bar Jointure, or to give them their choice.

They resolved that a Jointure should bar Dower; but qualified and relaxed the Rule, by giving a choice, where the Jointure had been made *after Marriage*:

The substance of the Clauses, expressing the intention of the Legislature upon the several points I have mentioned, is, that a Woman who then had, or thereafter should have, a Jointure made, should not have Dower in the residue of her Husband's Estate; but, if she was evicted of all, or any part, then she was to have a compensation out of the residue of her Husband's Estate; or if the Jointure was made after Marriage, she might refuse her Jointure and claim her Dower, with a proviso to save the Rights of Widows then existing. And it is very material in this place to observe, that the Act does not lay down two different Rules, one for Jointures which had been made before the Act, and another for Jointures which should be made after the Act; but the Rule laid down in one case, was to govern equally in the other.

It is impossible to sever the Cases in point of construction, because they are connected together in the same sentence: the words are spoken in the same breath, “Jointures made or hereafter to be made:” the measure of the Right was to be exactly the same; and indeed the

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Claufe is worded in fuch a manner as to fhew, they had their eye principally upon the Right of perfons who were then married.

And though it was alfo intended, "*imponere normam futuris*," yet the immediate object in their thoughts, was the Cafe of Women then living, and the adjustment of their Rights was to be the model by which the Rights of all Women, who fhould be married after the Act, were to be determined; and this Cafe muft now be confidered, as the Cafe of an Infant married at the time of the Act, and furviving her Husband; and therefore the true Queftion in this Cafe is really no more than this:

Whether the words in this Act of Parliament, "every Woman married having fuch Jointure made," that is, having a Settlement "*ex provifione viri*," with fuch Limitations as are mentioned in the Recital, or which fall within the Equity of thofe Limitations, did not comprize every Woman then married, whether fhe was an Infant, or an Adult Perfon, when fhe married.

If the words, "being under age, or of full age," had been added to the words, "every Woman married," there could have been no doubt but fhe would have been bound by them.

I think that it appears as clearly to be the intention of the Legislature to comprize Infants in thefe general words, as if they had been exprefsly named.

1st.—The words are general, "every Woman married," without diftinguifhing, whether they were of age or under age; and therefore, taking them in their common and ordinary fignification, they comprize Infants as well as Adult Perfons.

And the Exceptions and Notice taken of Infants in many Acts of Parliament, are a ftrong indication of the fenfe of the Legislature, that

even in respect of Parliamentary Bars to their Right, general words would include them.

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The 1 Rich. III. c. 7. directing that Fines conclude as well Privies as Strangers, excepts Infants.

The Statute 4 Hen. VII. c. 24. excepts them particularly, and that Act is worded in such a manner as to shew, most manifestly, the Legislature thought that the words, "the Fine to be a final end, and conclude as well Privies as Strangers to the same," would have comprized Infants, if they had not been excepted.

And the Case of Stowell and Zouch, in Plowden's Commentaries, is a direct Authority in point, that in a Case which does not fall within the Exceptions of that Law, the general words extend to Infants, as well as Adult Persons:

A Disseisor levied a Fine: two years past: the Disseisee died, leaving an Infant Heir at Law, who insisted that he was not barred by the Fine till five years after he came of age; but as the exception did not extend to that Case, and the time began to run in the Life of his Ancestor, it was held that it should run against him, as if he had been an Adult.

1 Rich. III. c. 1. enabling Cestui que Use to make Feoffments, proceeds upon a supposition that general words would include Infants; and to guard against that consequence, adds to the general words, "any person or persons being of full age."

The 23 Hen. VIII. and 21 Jac. I. Statutes of Limitations, except them particularly, upon an apprehension that the general words, "person or persons" would have included them.

The Statute 31 Hen. VIII. c. 13. sect. 16. enacts, "That the King shall hold and enjoy all such Honours, Castles, Manors, Lands,

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“ Lands, &c. as he hath obtained, and has by way of exchange,
“ bargain, purchase, or other whatsoever mean or means, according
“ to the true intent and meaning of his highnesses’s bargain, exchange,
“ or purchase, notwithstanding any mis-recital, mis-naming, non-
“ recital, or not naming of the Honours, Castles, &c. comprised or
“ mentioned in the writings or bargains made between the King’s
“ highness and any other party or parties, or of the towns or counties
“ where they lie—with a saving of the rights of all persons, except
“ the persons themselves, of whom the bargain, exchange, or purchase
“ was had, their Heirs and their Wives.”

This Act took away the Right of Dower from the Wives of the Grantors; and the exception of Wives out of the Saving, shews the sense of the Legislature upon a Title of Dower—That it was “a small thing and casual,” and therefore took it away from her, though she was not so much as party to the Grant.

The Husband might then have defeated Dower by Felony as well as Treason; and as he might have deprived his Wife of it by a Crime, the Act gave the same effect to his grant.

The exception out of the Saving, evidences the intention of the Legislature to take the Dower away, without any equivalent at all.

So in *Needler v. Bishop of Winchester*, Hob. 224. Lord Hobart speaking of this Statute, says, “As touching the meaning of the Statute to this purpose: the purposes of these Statutes were to establish
“ Conveyances to and from the King, according to natural Equity,
“ secundum equum & bonum,” which is, “Lex Legum,” without
“ respect to legal ceremonies: but it was never meant to enable those
“ persons, or their Grantees, who by natural defects or disable-
“ ments were, either by the Law of Nature, or by the Law of the
“ Land,

“ land, disabled to grant; and therefore, if an Idiot, Lunatic, or
 “ an Infant under seven years of age, had made a Grant to the King,
 “ this Statute had never made these good, for “ *Jura Naturæ sunt*
 “ *immutabilia.*”

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“ To conclude, as this Statute doth not confirm a Grant made of
 “ that, which is not the Grantor’s to give; so these weak persons are
 “ owners of the lands, to hold and retain to themselves, but are
 “ esteemed in Law as not-owners to give them away; and therefore
 “ it was a needless explanation in the Statute of Wills, that Idiots,
 “ and the like, should not be enabled to devise.”

“ The objection that was inferred out of the Saving of the Statute,
 “ where Wives were excepted, that therefore they were meant to
 “ be bound, moves me nothing; for (besides that it is a weak, im-
 “ plicit, and indirect inference to let in so great an absurdity and in-
 “ congruity of Law) that Exception doth not reach unto the Wives
 “ that are Parties, that is, to such as join in the Grant of their own
 “ Estates; but to the Wives of the Parties to the Grants, that is, hav-
 “ ing nothing but of the Wives Title of Dower, which being a small
 “ thing and casual, they were content to free the King’s Estate of;
 “ the words are “ other than the Parties, their Heirs, and Wives;”
 “ so they put the Wife in rank with the Heir.”

The Statute of Wills being conceived in general words, the 34 Hen.
 VIII. takes Infants out of those general words; and though I con-
 cur with Lord Hobart in thinking that it was not necessary to insert
 such an Exception, because an Act enabling persons to convey by a
 Will, could never have been construed to capacitate a person to
 convey, who could not convey by Deed; yet the more unnecessary it

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was, the more strongly it fortifies the inference drawn from it in favour of the extent of the general words in an Act of Parliament.

But many Cases have been put where the Law implies an Exception, and takes Infants out of general words, by what is called a “virtual” Exception.

I have looked through all the Cases; and the only Rule to be drawn from them is this, that where the words of a Law, in their common and ordinary signification, are sufficient to include Infants, the virtual Exception must be drawn from the intention of the Legislature, manifested by other parts of the Law, from the general purpose and design of the Law, and from the subject matter of it.

Whereas in the present Case, I will shew, 1st. an intention to include them, from other parts of this Law, from the general view and design of it, and from the nature of the Claim which is to be affected by it.

2d.—That this Act hath been expounded in such a manner, soon after the making it, as to shew that the Bar doth not arise from the agreement of the Woman to a Jointure before Marriage; but from the energy and force of the Act of Parliament, substantiating the Settlement against her for this particular purpose.

3d.—That if it was doubtful, Usage is the proper Decider of that doubt; and that the Usage has been in favour of this Construction.

4th.—That there are the greatest Judicial Authorities for it; only one Case, which passed “sub silentio,” against it.

1st.—Most of the Women of great Families and Fortunes were married under age, and the Marriage of Infants was given, or sold, like any other personal Property. The Legislature could not but know,
that

that a multitude of Wives, then existing, had been married under age. The 16th Section of the Act proves decisively, that it did arise in their minds; for that Clause takes notice, for another purpose, of Heirs being within age or of full age, which shews that these different periods of time were then in their contemplation; and Infancy therefore must have arisen in their minds as well as Coverture. Indeed, the idea of one disability cannot present itself to the mind of a Lawyer, without the other. They are so connected together, and the consequences arising from both, in many Cases (not in all) are so exactly the same, that they will obtrude upon the imagination at the same time. And when there is a Proviso qualifying the Bar in a particular instance, it is really equivalent to saying, "We mean the Bar should take place in all Cases whatsoever, except in the instance we have expressly provided for." And the Language of the Law upon this subject is, that in all Cases of Statutes with Provisos, they shall be taken generally, and in the most extensive sense, in all particulars, not restrained by the Proviso, by force of the general words.

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If they had not thought the general words would have barred Females Covertes, in respect of Jointures after marriage, it was a vain and useless Proviso.

It was absurd and ridiculous to take persons out of the Act, who were not in it; but the Legislature, by this Proviso, have in reality given their opinion upon this Question—they have in effect said, "the general words will extend to Jointures made upon persons under all kinds of Disabilities; but as that is not our intention, in respect of Jointures made after Marriage, we will take them out of the generality of the Law; but leave Jointures, before Marriage, to bar Dower in every other Case whatsoever."

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If it is said, that this was only a Clause of caution; the same caution which produced the Proviso in favour of Femmes Covertes, would have extended to Infants, in case they had meant to give the same Election to both.

And Lord Hobart, in *Sherley v. Wood*, Hob. 71. understands the Law in this manner; his words are, "The Statute of Uses hath a general purview, that Jointures made for Wives, without distinguishing before or after Coverture, shall bar Dower; and then comes a Proviso, that if it be made during Coverture, she may refuse it, and take her Dower; which is a kind of remedy provided for her out of the generality of the Law, and therefore must be pleaded by her:" that is, a Feme Covert is within the general words; and she must take herself out of the general words, by bringing her Case within the Proviso.

The Case put by Dyer in *Plowd.* 360. is very apposite to this Case. The Statute of Fines, in 18 Edw. I. mentions Infants, and not Femmes Covertes, which is the reverse of this Case; and Dyer is of opinion, that because Femmes Covertes were not mentioned, they were bound by a Fine and Non-claim, under that Act.

This Proviso relating to Jointures after Marriage, does not take a Feme Covert out of the enacting Clause generally, as it would have done, if it had said, "provided this Act shall not extend to Femmes Covertes;" No—Femmes Covertes were the objects of the enacting Clause. The Bar was created and opposed to them by the designation of married Women; and the Proviso only removes the Bar, at their Election, in a particular Case; and therefore, even in respect of Jointures after Marriage, Femmes Covertes are still within the general words to every purpose whatsoever, but the special purpose
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of making an Election whether they will take their Jointure or Dower.

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For suppose a Jointure is made after Marriage, and a Woman accepts it, and brings a Writ of Dower: if she is not within the general words of the enacting Clause, she must have both.

To another purpose a Wife, in respect of a Jointure after Marriage, is within the enacting Clause; for suppose she was to elect her Jointure, and afterwards be evicted. If she is not within the enacting Clause, she is not within the Proviso which immediately follows the enacting Clause, and gives the compensation, viz. "provided that if any such Woman be evicted, she shall have a compensation." What Woman?—Every Woman having a Jointure mentioned in the enacting Clause, and no other; and therefore, unless the enacting Clause includes a Woman, in respect of a Jointure after Marriage, she could have no compensation out of the residue of her Husband's Estate, upon an Eviction of all or any part of her Jointure made after Marriage.

If Infants were not included in the general words of this Law, they must have been entitled both to their Settlements and Dower; for this is the only Clause in the Act which can take that Common Law Right from them; and if an Infant elects a Jointure made after Marriage, and is evicted, she is not within the compensating Proviso, unless she is within the general words of the enacting Clause; for it can extend to no other.

But to avoid that inference, which proves too much, it has been said that Women may be so far included in these words, as to prevent their being entitled to both their Jointures and Dower; yet still it must

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must be understood to leave them to that right which the Common Law gives them, of disagreeing to these Estates when they came of age: that even before this Act of Parliament, they were not obliged to take the Estates limited to them by these Settlements, "ex provisione viri;" and that it would be a most harsh and severe exposition of this Statute to take away a right, which they had, of refusing those Settlements.

But if they are included in the general words for one purpose, they must be included for every purpose to which the Provision of that Clause extends. And I do not contend that this Clause takes away the right which Infants have of disagreeing to their Settlements after the death of the Husband. They might disagree to them after this Act if they pleased, as they might have done before the Act; but still the Statute gives these Settlements the energy of a Bar.

It was the existence of a Settlement made before Marriage at the time of the Act, and of a Settlement made before Marriage since the Act, which constitutes the Bar within the meaning of this Act of Parliament.

If the Settlement existed at the time, the Bar attached the instant the Act passed. The right of Dower was that moment annihilated, as to all Women who were then living, and had Jointures made before their Marriage. To this purpose the Statute impregnated the Settlement with the quality of a Bar, which could not be varied either by accepting or refusing the Settlement afterwards.

And when a Settlement was made after the Act, before Marriage, the right of Dower never arises. The Statute interrupts the right: there is no inchoation of it by the Marriage. In that particular it

is a Repeal of the Law of Dower; it is saying that a Marriage so circumstanced shall have no effect "quoad dotem:" it is as much a Plea in Bar as "never coupled in lawful Matrimony."

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But it may occur, that a Jointure, when refused, is void "ab initio;" and therefore, that the Wife, in that case, is not a Woman having a Jointure, when she claims her Dower:

When an Estate is refused, it does not become void to all intents and purposes, as if it had never been: for suppose an Estate conveyed to a Feme Covert, or an Infant, and the Grantor afterwards makes his Will, and devises it, and the Feme Covert, or Infant, afterwards refuses; the Will of the Grantor will not be good. Butler and Baker's Case, 3 Co. 25.

But suppose it was void at Common Law, yet a Statute may give it a being and an effect for a particular purpose, and at the same time leave it, for every other purpose, to all the consequences which it would have had, if the Act had never been made.

If she had a Jointure when the Act passed, or, since the Act, has a Jointure at the time of the Marriage, and may take that Jointure if she pleases; the Act has drawn the line upon her, and says she shall have no choice. For the Act is not, "every Widow having a Jointure when she demands her Dower;" but, "every Woman married having such Jointure made or hereafter to be made;" and a Jointure which had been limited to an Infant before Marriage, was a Jointure made, and so effectually made, that she could not disagree to it till her Husband died; and in that respect differs widely from a Conveyance made by an Infant of her own Estate, which she may avoid at any time.

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All Books, which treat of Dower, speak of it as an inchoate, inceptive, initiate right, given by the Marriage, and consummated by the death of the Husband.

The death of the Husband does not give it, but completes it; and if a Settlement before Marriage prevents the right from ever beginning, the death of the Husband cannot consummate what never began; much less a Refusal, which must be posterior to the death of the Husband.

The Case, put at the Bar, of a Fine levied of a Jointure made before Marriage, and of one made after Marriage, is in point to shew, that the Bar is created by the Settlement in the one case, and by the Acceptance of it in the other. If a Fine is levied by Husband and Wife of a Jointure made before Marriage, the Wife cannot claim Dower in the residue of her Husband's Estate; but if it is levied of a Jointure made after Marriage, she may.

What is the reason of the difference? because the right of Dower had never existed in the one Case, but it had in the other; and nothing could bar it but Acceptance, which could not be till after the Marriage, and then there was nothing to accept.

And is it to be conceived, that when the Legislature was forming a Law of such importance to the Public, which was to be, and really has been, and now is, the basis of all the real property in the Kingdom, and they were considering the consequence of that Law in respect of married Women, (and in the Case of Women, married Infants must have occurred) they should leave so many married Women upon a virtual Exception in one Case, and guard them by an express proviso in another?

It is very material to observe, that this Act of Parliament, even in its great and principal object, the union and consolidation of the legal Estate and the Use, takes into its grasp Infants, as well as adult Persons, in general Words: the words are, “where any person or persons shall be seised to the use of any person or persons.” Suppose the legal Estate had at that time descended upon an Infant, and the Use at that time were in an Infant: this parliamentary Conveyance would certainly have taken place, in such a Case, exactly in the same manner as if they had been of full age, or an Act had passed in any particular Case enabling one Infant to convey to another.

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Upon what foundation would such a Construction have been made? Because the words in their proper and ordinary signification comprehend Infants; and there was the same reason to unite the legal Estate and the Use in the case of Infants, as of adult Persons.

But it may occur, that in such a Case there could be no prejudice: it was only vesting the legal Estate where in equity and conscience it ought to be.

Answer:—1st. It shews that the Act was dealing with Infants by general words.

2d. That no prejudice could arise to Infants, by giving their Settlements the effect of a Bar, which the Legislature did not intend in the case of adult Persons.

What was the reason of making a Jointure before Marriage bar Dower, and not letting Dower bar the Jointure? They found an infinite number of Estates at that time under Settlements, with Limitations made by Husbands and their Ancestors to Wives in Tail, because that was the strictest Settlement which the Law then knew.

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The injustice of repealing these Settlements, which are domestic Family-Laws, adapted to the circumstances and exigencies of every particular Family, must have determined them in a moment not to lay the least foundation for breaking in upon them; and as they could be made from no other motive but a desire to secure a proper Provision for Wives surviving their Husbands, the Legislature saw there could be no hardship in refusing them a choice of Dower, in opposition to their Settlements; and though Dower in their Husbands Estate (even before the union effectuated by this Act, but particularly after this Act) might, in some particular instances, be more valuable than the Estates provided for them by these Settlements; yet this inequality, in particular instances, was most amply compensated to the Sex in general, by putting such an infinite quantity of Property within the reach of Dower, where no particular Provisions had been made for them. “Nulla Lex satis commoda omnibus est—
“id modo queritur, si majori parti et in summâ re prodest.”

The Rule laid down by the Legislature was this: let Women, who have no Settlement, take their Dower in all their Husbands Estates, whether those Estates were vested in them before this Act or by this Act: but let the Women, who have Settlements made before their Marriages, acquiesce under those Settlements, and abide by the Provisions which have been thereby made for them, whether they are great or small, adequate or inadequate; whether they have been made by the Agreement of themselves or their Friends, or have been the mere spontaneous Acts of the Husband or his Ancestors.

The Objection of Fraud, so much relied upon, does not exist, as applied to a Settlement made before the Act; for a Settlement could

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not be made to bar Dower fraudulently, when it could not be made to bar it at all.

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But (it is said) though it could not be made fraudulently to bar Dower, yet the Wife might have disagreed to the Settlement, and have refused to accept the Estate given to her by it.

It is a very foreign supposition, that an Estate should be limited to her for a Provision not worth her acceptance, when she could lose no other advantage by accepting it; but suppose it was “*damnosa Hæreditas*,” did the Legislature mean to take away her right to disagree, and force the Estate upon her, “*nolens volens?*” Certainly not. She might agree or disagree to the Settlement, just as she might have done before the Act; but the Bar, which the Act has given to the Settlement before the time of agreeing or disagreeing comes, cannot be avoided by her refusing to accept it. It is the Will of the Legislature, acting upon Settlements then existing, which constitutes the Bar, and not the agreement to those Settlements.

Suppose instead of making these Settlements a Bar of Dower, they had given Women a right to elect, to take which they would, what would have been the consequence? It would have put it into the power of every Woman in the Kingdom, where the Estate was limited to her in Tail, to have defeated the Limitation to the Issue, and thereby to overturn the strictest Settlements which were then existing, or could then have been made: for she could not refuse for herself only; because the Estate Tail being to vest in her, either totally or not at all; if she refused to accept the Estate Tail, it must vanish as to the Issue; and wherever the Dower was more valuable than the Estate limited by the Settlement, she would have been balancing the difference, and tempted to make an Election of her

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Dower; and the Issue who were Purchasers for a valuable Consideration under their Father, as well as their Mother, must have lost the Estate.

To illustrate my meaning by an instance—By a Settlement before Marriage, an Estate stands limited to the Husband and Wife, and to the Heirs of the body of the Wife by the Husband to be begotten, leaving the Reversion with the Husband. The Husband sells the Reversion, or limits it over to his Brothers or other collateral branches of his Family, and dies, leaving Issue. The Wife surviving says, “ I “ was an Infant when this Settlement was made, and therefore I “ will refuse the Estate given by this Settlement, and have my Dower “ out of the whole Estate.” What would have been the consequence? The Issue of the Marriage would have been disinherited, and the Estate gone to strangers, or to the collateral branches of the Family.

Did the Legislature intend to leave this right in an Infant any more than in an Adult? When the Settlement was made, it was thought to be a proper Provision.

Women may accept or refuse their Jointures as they please; but if they do refuse them, they shall not have Dower; and when that temptation was taken out of their way, there was no danger of their defeating the Limitation to the Issue of the Marriage by a refusal.

It is said that the motive which induced the Legislature to give Females Covertes an Election, in respect of Jointures after Marriage, was because they were “ sub potestate viri,” and incapable of contracting:—that Infants are equally incapable, and therefore ought to have the right of Election.

That is saying in so many words, that a person to whom no right is given by the Act to elect, shall be in the same situation as a person

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to whom a right is given by the Act to elect; which is in reality to destroy the distinction which the Proviso in this Act has made and established.

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Suppose the incapacity of contracting to be the reason for giving an Election in the Case of a Jointure after Marriage, and this Objection had been made at the time of passing the Act. "You give Females a choice as to Jointures after Marriage: why do not you give Infants a choice as to Jointures made before Marriage? They are equally incapable of contracting." The plain and obvious answer must have been, "The cases of an Infant before Marriage, and of a Woman after Marriage differ most essentially: a Female is under the absolute controul of her Husband: he would be contracting with himself. The principal contract, the Marriage, is past; and by that Marriage the Wife has acquired an inceptive right of Dower, which he shall not take from her. But an Infant is not under the controul of the Man, before she has married him. She is under the controul of her Parents or Guardians; and, though a Marriage without their consent cannot be rescinded, yet the Law expects and requires their Consent, and punishes all Marriages contracted without it."

"Settlements are made by the interposition of Parents and Guardians. They are the persons whom the Law appoints to direct the Infants in these stipulations, and to oppose to the intended Husband. "Ad ea quæ frequentius accidunt, Jura adaptantur." A Marriage, without their Consent, would not have entitled the Wife to Dower: for though the Ecclesiastical Law did not rescind the Contract, because it could not restore her to what she had lost by the execution of it, yet the Bishop would not have certified such a
" Marriage

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“ Marriage to be “ *legitimum Matrimonium*.” It was not a Con-
tract to affect a right which she then had, as is the case of a Jointure made after Marriage; but it is a contingent right merely, which she is to derive through a Contract, which the Law enabled her to make. Her own Estate is not affected by it.”

“ Conditions, express or implied, bind Infants. This is a kind of Condition annexed by the Husband to the disposal of himself. If she takes him, she ought in justice to abide the terms on which she accepted him: She ought not to retain the benefit of the Contract, and then reject the Condition upon which the Husband entered into it.”

“ We find an Infant competent to the principal Contract; and therefore will consider her competent, as to this precedent Contract which induced the Husband to enter into it.”

“ By giving the Wife a right of Election in the case of a Jointure after Marriage, we leave the Husband’s Estate exactly in the same situation as when the Settlement was made, subject to the right of Dower which the Marriage had given; but by giving a right to elect Dower in the other Case, we should subject the Husband’s Estate to a right which it was not subject to when the Settlement was made, and which he might have effectually prevented at that time, either by not marrying her at all, or keeping his whole Estate out of the reach of that right. And the Law makes an essential difference between the privilege of Infancy, in respect of Rights vested in Infants, and a Title to things which never were vested in them.”

If an Infant had Title to enter for Mortmain, and did not enter within the year; or if he did not enter into lands purchased by his

Villein

Villein before the Villein had aliened them; he could not enter afterwards in either case; for there he had nothing but a title to a thing which never was in him. Plo. 364. b.

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Though the Common Law says, "that persons must treat with Infants at their peril; because they will be bound by the Contracts they make with them, and Infants retain their right of avoiding them;" yet that regards only Contracts affecting their own original property, not meaning that they should derive an interest out of the property of another person. It would be a Fraud upon the Husband; and the Case cited at the Bar out of 2 Leon. 108. Piggot and Ruffet, is a strong instance that Infancy shall not protect a Fraud; and that an Infant may, by his own assent, preclude himself of a contingent Right even in his own Inheritance, viz. "If Tenant for Life, being of full age, and he in Remainder within age, levy a Fine, and afterwards the Infant reverses the Fine as to him, for the Inheritance, he shall not enter for the Forfeiture, because he joined in the Fine, and so assented to it."

Upon what principle does this Case stand? If a Tenant for Life levy a Fine, it is a Forfeiture; and when the Tenant had reversed it, it was totally void as to him, "ab initio," and as if it had never existed; and yet the same reason might have been urged which is offered in the present Case.

He could not preclude himself of this Right of Entry for the Forfeiture. The Law gives him as good a Right to enter upon such an Alienation, as if the Tenant for Life had died. It is a contingent Right which every Reversioner or Remainder-Man has in the Estate; and an Infant can by no Act prejudice such a Right. But the Common

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mon Law says, he shall be bound by his Assent, as he had been a Party to the Act under which he would derive his Right.

I have not been considering what the Law would have been, independently of this Act of Parliament, but mentioning such reasons as distinguish the Case of an Infant, before Marriage, from a Feme Coverte, and shew the justice of the Legislature in making a difference between Infants jointured before their Marriage, and Women jointured after their Marriage, and opposing the Bar to one, and relaxing it in favour of the other.

The difference arises from the different situation the Parties were in at the time of making these Settlements.

The Legislature would not take away a Right which the Wife had acquired by her Marriage; but they would hold her to a Settlement made when she had no Right at all.

It may perhaps occur, that a Right of Election is given to waive a Settlement after Marriage, and yet a Settlement after Marriage could no more be fraudulent before the Act, than if made before the Marriage; and the Right of the Issue may be defeated by an Election of Dower in that case as well as the other. It is true it could not be fraudulent; but it differs widely from a Settlement before Marriage in another respect. By a Settlement before Marriage, the Issues of the Marriage are Purchasers for a valuable Consideration under their Father's Marriage, as well as their Mother's; but in Case of a Settlement made after Marriage, the Settlement is merely voluntary, and the Issue not entitled to the same protection.

Perhaps it may be said, that though a Settlement could not have been made fraudulently before the Act, yet it might after the Act.

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If this objection of Fraud had any weight in it, which I shall shew it has not, it might have been a reason for laying down different Rules as to Jointures then made and afterwards to be made; but it cannot warrant us to lay down two Rules, when the Act has only laid down one.

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I must repeat the position again in this place: that this Case must be determined exactly in the same manner, as if it had been the Case of an Infant married at the time of the Act; and then how would the Argument have stood? The possibility of a Fraud to come, shall defeat a Settlement made when there was no possibility of any Fraud at all.

This leads me to the Case of a pocket Jointure, or a Jointure made fraudulently to bar Dower, which seems to have been the most plausible Objection in this Case; but when it comes to be examined closely will appear not to have the least weight in it: for a Jointure made fraudulently, to bar Dower, is not the Jointure which the Law acknowledges and sanctifies. It must be a "competent Livelihood of Freehold, for the life of the Wife." The pattern and model of the Jointure to be made, is given by the Act. It must be such a Jointure as was made before the Act. What was that? a Jointure without Fraud; because a Jointure before the Act could not have the least shade of Fraud in it.

A copy after that original is what the Law means by a Jointure: But can the Common Law examine this Fraud? Competency is a very vague indefinite term: How is the line to be drawn with respect to this competency? How! as in all other Cases whatsoever—by a Jury, under the direction of the Court which tries it.

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The circumstances of the Parties, their rank and quality; the proportion of the Jointure to the quantum of the whole Estate; the consent of Parents or Guardians in ascertaining it; and every Fact which shews the transaction fair, and every Fact which shews it fraudulent, must be laid before the Court to direct their judgment upon it.

A pocket Jointure, made upon a Woman without her privity, or upon an Infant with her privity, without the interposition of Parents or Guardians, would be such an evidence of Fraud, as would be sufficient to condemn it; and it is not without a Precedent in the Common Law, that the validity of the Act of an Infant should depend upon the fairness of it: for if an Infant makes a Partition, and it is equal, it will bind him; if it is unequal, it will not. Co. Lit. 171. The validity of the Partition depends upon the fairness of it.—A beautiful instance of the care the Law takes of Infants with respect of their own property, by making it the interest of the Party, who treats with them, to do them complete justice.

The Case supposed would want no Trial at all; for it would be Fraud apparent, like the Case put in Hardres, 56. Attorney General v. Shirt. “The King was entitled to one Tun out of every ten Tuns of Wine imported. A merchant imported nine Tun and a half. The King demanded and had a Tun.—The Court said it was Fraud apparent, without proof.”

It would be endless to enumerate instances where the Common Law takes notice of Fraud, and annuls acts done from so vicious a motive.

If the Common Law had not strength and activity enough in it to condemn an act founded in iniquity, it would ill deserve the character

Lord

Lord Coke gives of it, who says, "that it has been fined and refined by an infinite number of grave and learned men, and is the perfection of human reason:" whereas, if it was incompetent to such a Question, I should think it had been fined and refined out of all its spirit, and was the *corruption* of human reason.

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I will mention two or three Cases upon this head, and allude to twenty. 3 Co. 77. Fermor's Case.—A Lessee for years, and at will, of Freehold Estates, and also a Copyholder of Lands lying in the same Town, had also Lands of Inheritance lying in the same Town; and by a Deed he conveyed all the Leasehold and Copyhold Lands to a man for his Life, and then levied a Fine of so much Land in quantity as would comprize the Leasehold and Copyhold, as well as his own Inheritance, by Covin and Practice to bar the Lessor of the Inheritance of the Leaseholds and Copyholds.

Five years elapse, and the Lessee continues in possession, and keeps paying his Rent to the Lessor. The Grantee of these Estates dies, and the Lease for years expires, and the Lessee would then have set up the Fine, and five years Non-claim, to have barred his Lessor.

The Book says, that the Case, being of great importance and consequence, was referred to all the Judges: and what did they say? Though the Fines are the general Assurances of the Realm, and the Act of Hen. VII. has declared that they ought to be of the greatest strength; yet the Legislature never intended to establish a Fine levied by Fraud and Practice, and therefore it was held no Bar, by all the Judges. The Statute of Hen. VII. intended to make a Fine and Non-claim a complete Bar; but not a Fine levied fraudulently to cheat people.

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So this Statute intended to make a Jointure a complete Bar; but it must be a Jointure to support and maintain a Wife, and not a Jointure made fraudulently to cheat and starve her.

In Fermor's Case, there is a variety of instances where the Common Law takes cognizance of Fraud, and avoids almost all kinds of acts when they are infected with that poisonous ingredient.

A person in custody for Felony may, before Conviction, "bonâ fide," and for a valuable consideration, dispose of his personal Estate. A person in that situation made a Bill of Sale of his Goods, to make a Provision for his Son. He was afterwards convicted, and the Sheriff seized the goods contained in the Bill of Sale, as forfeited. The Son brought an Action against the Sheriff for the Goods; and Holt, Chief Justice, said, that there was a Fraud at Common Law, in such a Case as that was; and that such a Conveyance could not be intended to any other purpose than to prevent a Forfeiture, and defraud the King.

So I say, in Holt's words, that such a Conveyance, as has been supposed at the Bar, cannot be intended for any further purpose than to defraud the Wife: and I will only mention one other instance where the Law controuls very legal acts, if the manner of obtaining them has been fraudulent.

An Assignment of Dower by a Disseisor shall bind; but if the Widow hath colluded with the wrong-doer, it shall not, because the Covin shall suffocate the Right, and so the wrongful manner shall avoid the matter that is lawful. Co. Lit. 35. a.

But perhaps it will be asked, how is this Fraud to be come at? Is there any Precedent to be produced of deducing such a Question

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of Fraud before a Court of Law?—No such Case has ever yet existed; but when it does exist, a way will very easily be found to get at it.

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Pleading is only telling with accuracy and precision what the Law is; and if the Law says an act done to defraud ought to have no legal effect, there seems to be no great mystery in saying so, either by a special Plea, or upon some general Issue.

For instance, a Writ of Dower is brought, the Tenant pleads a Conveyance made before Marriage of particular Lands to the Wife for her Jointure. The Plaintiff might reply, that it was made by Fraud; and upon a general Issue of "Fraud or not Fraud," the whole might come before the Court under such an Issue; or the Plaintiff might reply the several Facts which evidence the Fraud, and the Case be brought before the Court upon a Demurrer.

But taking the Case put in its fullest extent, it is doing no more than what is practised every day in effect, by putting the Estate into Trustees, and taking joint Purchases after Marriage to prevent Dower; and a strict Settlement made before Marriage, with a power of Revocation, will prevent Dower, and, at the same time, preserve to the Husband an absolute dominion over the Estate; and therefore, all the Objection of prejudice to Infants, as the Law now stands, vanishes in a moment: for what detriment can it be to Infants to preclude them from Dower, by a small Estate, when they may be equally precluded from it without giving them any Estate at all?

Another reason against giving a right of Election to a Woman when she came of age is, that the Right must remain in suspense until that time, both in the Case of a Jointure made upon an Infant before Marriage, and after Marriage.

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For suppose the Husband dies, leaving an Infant Wife: she brings a Writ of Dower, and the Jointure is pleaded in Bar—and Infancy is replied. She is not to have both—Which is she to have during her Infancy?

If the Jointure is good, and bars till disagreed to, there must be Judgment against her in the Writ of Dower: and if she disagrees to Jointure, and avoids it “*ab initio*,” how is she to get at her Dower when she comes of age? for there is a Judgment in Dower against her. And if she does not sue a Writ of Dower, but takes possession of her Jointure, is the right of Dower, said to be consummated by the death of the Husband, to be turned by a construction of this Act into a contingency, and lie in suspense till the Infant comes of age, and be totally uncertain whether it shall ever exist at all?

This Question is determined in a Book, published in the year 1632, called the “*Laws and Resolutions of Womens Rights*.” There is a Section in that Book with this Title:

“What is a sufficient Refusal or Agreement of or to a Jointure made after Coverture?” And there the Case is put: “if she bring a Writ of Dower, and declare upon it, this is peremptory, although she be under age, Covert or not Covert of a second Husband; for the Law saith, that they which have discretion to acquire and get things, have sufficient discretion to give and preserve those things gotten. Therefore, if an Infant come to any thing by Purchase, he shall not in that have any advantage, or be in better plight than a person of full age.” And the same Book enumerates many instances of Infants being bound by their own Elections.

An Estate to an Infant of two acres, the one for Life, the other in Fee: Feoffment of one, though under age, is a sufficient Election.

If Rent be given to an Infant, and he bring Writ of Annuity : his Election is determined, and he shall not avow as for a Rent when of full age.

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If Infant recovers Debt, and sues an Execution by Elegit, it shall bind him.

And when Littleton, who is so very correct a Writer, says, Sect. 41. that if after the death of her Husband, the Widow enter and agree to Dower, “*ad ostium Ecclesiæ*,” or, “*ex assensu patris*,” then she is concluded claiming any other Dower; it must be intended of an Infant, because in the Section next but one preceding, where he does not intend to include an Infant, he expresses himself, and correctly says, “where a man of full age endows;” and in 47th Sect. he puts the Case of a man seised in Fee Simple, being within age.

The different form of pleading a Jointure made before and after Marriage, is extremely material to prove, that it is the act of the Husband which makes the Bar in the one case, and the subsequent Agreement of the Wife which makes the Bar in the other.

Where the Jointure is made after Marriage, and is pleaded in Bar of Dower, there is an Averment that she accepted it. But when the Jointure is made before Marriage, Acceptance is not pleaded at all.

In the Case in Co. Ent. 172. the Wife is not so much as a Party to the Deed of Jointure, and she is so far from availing herself of her not being a Party or Privy to the Deed, that she replies, there was no such Deed; which is an implied admission, that if there was such a Deed, she was bound by it.

In 2 Brownlow, 181. Acceptance is not pleaded. “*Doctrina placitandi*,” 149. “If an Estate is made to the Wife, before the Cover-
ture or afterwards (if she after the death of her Husband enter and

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“ agree to it) for the term of her own Life, or for a greater Estate,
“ this is a Bar.”

These Rules are extracted out of legal Principles, and are the pith and marrow of the Law. The Entry and Agreement, after the death of the Husband, can relate only to the Estate made after Marriage; because in the Case of an Adult agreeing to a Jointure before Marriage, it is admitted that Acceptance after the Husband's death is not necessary; and as the Rule is laid down generally, it must be understood as generally to comprise an Infant as well as an Adult, or otherwise so accurate a Book as that is, would have taken the distinction.

2d.—I will now shew that this Act has been expounded in such a manner, as to prove that the Lien or Bar doth not arise from the Agreement of the Woman; but from the energy and force of the Act of Parliament, substantiating the Jointure made by the Husband.

Between the 27 Hen. VIII. and 13 Eliz. which was about the space of thirty-five years, it appears that it had come in Question before the Judges, whether a Woman could refuse a Jointure made before Marriage?

In Plowden, 396. Lord Leicester's Case, which was in the 13 Eliz. (before Vernon's Case, which was in 14 and 15 Eliz.) Anderson says, “ the Act of 27 Hen. VIII. c. 10. which enacts, that Women shall
“ not have Dower where Lands were assured to them and their Husband
“ bands for a Jointure, has a Proviso, that if any Feme has Lands
“ assured after Marriage to her for Life, that then such Feme may
“ at her liberty, after the death of her Husband, refuse to have and
“ take the Lands so assured to her for her Jointure, and demand her
“ Dower. And because that the words are, “ Assurance after Mar-
“ riage,”

“riage,” it had been taken, that if the Assurance be before Marriage, that she shall not refuse; for by the Implication of the words, the Judges have taken the intention of the Makers of the Act to be so.”

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In what Case, or how long before that time, the Judges had put that construction upon the Act, does not appear; but it must have been in less than thirty-five years since the making of the Act.

This Question, and the Determination upon it, must have arisen upon a Case where the Woman had not previously accepted the Jointure: for if, previous to the Marriage, she had accepted it, no Question could have arisen whether she was bound by it. It could never be a doubt whether she could refuse what she had once accepted. And though this is to be understood of a Woman of full age, yet, if the Agreement of a Woman of full age is not required by the Law to constitute the Bar, the Argument, drawn from the incapacity of an Infant to agree, or the privilege of an Infant to disagree, falls intirely to the ground.

4 Co. 3. a. Vernon's Case. It is said, “that a Woman cannot, after the death of her Husband, waive a Jointure made before Marriage, and this by force of the Proviso.” And 1 Inst. 36. b. Lord Coke lays it down, that a Jointure made before Marriage was not waivable at all.

And the position is echoed through all the Books which speak upon this subject, so emphatically, that it must be meant of a Jointure which had not been previously accepted: for there was no occasion to raise Judges from their graves to tell us, that a Woman could not refuse what she had once accepted.

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But suppose the Construction only doubtful, what is the Rule? Usage is the best Decider of the Doubt. "Optimus Legum interpretres est consuetudo." Where the penning of a Statute is dubious, long usage is a just medium to expound it by. Lord Vaughan; 169.

3d.—As to the Opinion of the Conveyancers of the present age, though as able as any who ever lived, yet it has not been laid before us with that certainty which it ought to be, if our Judgment were to be directed by it.

I prove the Opinion of Conveyancers for two centuries by this medium: it is now about two hundred years since the Statute of Hen. the VIII. was made.

That Jointures have, in fact, been made upon Infants before Marriage, ever since the Statute, and for many years past under the direction of the Court of Chancery, is a fact too notorious to be disputed: every great family in the Kingdom is in possession of such Settlements, and yet there is not one single instance where they have ever been disputed.

In some instances Wives might die before their Husbands: in others, the Jointure might be more beneficial than the Dower; but there must have been many hundreds where it was otherwise: and if it could be conceived that there never has been an instance where the Jointure has been of less value than the Dower, there is no reason to disturb the Usage, from the apprehension of a Fraud which has never been practiced.

If there have been instances of Jointures inadequate to the Dower which Wives would have been entitled to, and those Jointures have

never been rejected, and Dower resorted to, it shews the sense of two Centuries upon the Question.

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The Practice proves the Opinion; and the uninterrupted acquiescence under the Practice proves the rectitude of the Opinion.

4th.—As to Authorities, the Cases of Price and Seys (*a*), and Harvey and Ashley (*b*), are in point: I heard them both, and took a very particular Note of the latter (*c*); but for fear of any mistake, I have
the

(*a*) Barnard.
Ch. Ca. 117.

(*b*) 3 Atk.
607.

(*c*) The following Note of this Case of *Harvey v. Ashley*, is taken from Mr. Justice WILMOT's MSS.

Harvey and Dorothy his Wife, against Ashley and his Wife and others.—The Plaintiff Dorothy being fifteen years of age, and entitled to £.5,000 under her Grandfather's Will, if she married with the consent of her Mother, and to other contingent and future Provisions, married Mr. Pitfield her Cousin-german. Previous to the Marriage, a Settlement was made, dated 29th of June 1737, between Mr. Pitfield, Mr. Ashley and his Wife, the Trustees, and the young Lady, Dorothy, whereby Mr. Pitfield's Estate was settled in strict Settlement, the other part being already settled; the £.5,000 is agreed to be paid, and to be applied to exonerate a part of Mr. Pitfield's real Estate; there was also a contingent provision of £.3,000, which Dorothy was entitled to, and agreed that one moiety should be paid to Mr. Pitfield, and the other moiety sold; and an Agreement was also made for settling another part of Dorothy's personal Estate, which she was entitled to under the Will of her Grandfather; the £.5,000 was paid, and £.4,000 more of her personal Estate was applied in paying off the incumbrances affecting the Estate of Mr. Pitfield. There was Issue only one Child of the Marriage, Mary, an Infant: in August 1740, Mr. Pitfield died. December 1740, Dorothy married Harvey; June 1743, attained twenty-one; 10th January 1745, the Bill was brought to set aside the Marriage Settlement, and for other Purposes.

“ Lord Chancellor (HARDWICKE):

“ The first point is, Whether the Plaintiff Dorothy, and Mr. Harvey in her right, are bound by this Marriage Settlement, by the original nature and force of the Agreement taken abstractedly.”

“ The first Objection is, That Dorothy was an Infant, and could only be bound by her Election, and that no other persons could bind her properly by their Contract. But Marriage Agreements differ from all others. The principal Contract is the Marriage; and an Infant Female may contract at the age of twelve. All the other parts of the

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the Notes taken of those Cases by the late Lord Chief Justice RYDER, whose judgment, accuracy, and fidelity to his Clients, were as eminent as in any Advocate who ever yet existed. And in the Case of Price and Seys, he states, that the point was argued at the Bar, and that the Lord Chancellor (HARDWICKE) said, "it was clear in Law, that if a man married, and before Marriage, in consideration of it, and

" Contract are collateral incidents, entered into to secure some provision for the Party marrying and the Issue, and may be greater or less according to circumstances."

" As soon as the Marriage takes place, the principal Contract is executed, and cannot be set aside or rescinded; the state and the capacities of the Parties are changed, and Children born, or to be born, are Purchasers under it; Purchasers both under their Father and their Mother; therefore it was admitted by Mr. Wilbraham, that the Court would take care how they broke in upon Settlements, made on the Marriage of Infants; because the principal Contract being good and not rescindable, it may affect the Issue of the Marriage, and the rights of third persons, to avoid them. On this ground it is, that the difference has always been observed between the execution of other Agreements in specie, and of Marriage Settlements."

" Other Agreements are entire; if either Party fail, no Execution ought to be in specie; but in Marriage Agreements, though the Father or Mother, or the Friends of either, do not perform them, the Children are entitled to call for a performance from the other Party, because they are Purchasers from both; the Court may lay their hands on the Father or Mother's Estate or Interest in the thing settled to make it good."

" But if this Court should interpose to set aside, or give relief against, any part of a Marriage Settlement, it must relieve against and avoid the whole: for every part makes the Consideration of the whole of every thing; and it is impossible, where there is no Fraud, to say this part is unreasonable; you have gained too much on one side, and therefore that shall be deducted. This makes it a different bargain, and, in consequence, the Uses of the Estate must be broken in upon on the other side. Nay, in the present Case, the Interest of the Plaintiff Dorothy may be greatly concerned. If she takes back any part of her Fortune, she must waive and renounce her Jointure, and the Limitation of the Fee to herself."

" Consider what may be the consequence—her Mother dies, her second Husband becomes entitled to the Moiety of the surplus of the Grandfather's property in her right (now settled), which he may dispose of as he pleases, and she may be stripped both of Jointure and Portion."

" The Law has entrusted the Father (or Guardian) with the Marriage of his Children; but they ought not to use it to their disparagement. Suppose he does it fraudulently
" and

and of her Portion, makes a Jointure on his Wife; though she was an Infant, she cannot waive her Jointure and set up her Dower. So it is expressly laid down, 1 Inst. 57. Now in Equity, where there is a Settlement, in consideration of Marriage, and of the Wife's Portion, consisting of Securities, if the Husband dies before they are got in, his Executor shall have them, and not the Wife. The Husband would become a purchaser of the Wife's Portion; and his Representatives might

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" and corruptly, is the Agreement therefore to be set aside or broken in upon, or the Children not to have the benefit of what is stipulated? By no means; but the Guardian may be compelled to make satisfaction; or the Husband, if he is party to the Fraud."

" In the case of a Father; if a Child has a Fortune independent, and the Father disposes of the Child in Marriage corruptly, and takes an advantage to himself, this Court would relieve against the Father. On this ground depend the Cases of Relief against private clandestine Agreements, made in fraud of the public open Agreement."

" But this Case comes within none of these reasons of disagreement—Cousin-german—Heir Male of her Mother's Family—a natural match to desire—no pretence of any Corruption, Fraud, or ill Practices in the Father or Mother—no lucrative advantage taken to themselves. On the contrary, every thing done on their parts to advance the Child. The Mother consents to the Marriage—accelerates her right to the £. 5,000, and vests it immediately—confirms a method to charge the Father's Estate with £. 3,000, of which, in the event, she might not have been entitled to one shilling—this they leave, for the benefit of her and her Children, to disencumber the settled Estate, and for the provision for the Children."

" The second Objection is, That they have not made so beneficial a bargain for this Daughter as they might have done. If it were so, is that a sufficient reason for setting aside a Marriage Agreement? The Law has entrusted the Parents with the care of the Marriage of their Children; there are many considerations, which may induce them, besides strict Equality, or advantage in Settlements—inclination of the Parties—rank and quality of the Person—convenience and propriety in Families—bringing together and uniting different parts of the same Estate; all these are proper reasons. The Statute of Jointures is a strong evidence of the Judgment of the Legislature upon this point. Jointure on an Infant before Marriage, though not equal to Dower, is a good Bar. It is true that the greatest part of the provision for this Lady arose from her Grandfather; but was it ever thought that a Father could not effectually contract for the Marriage of his Daughter, and the disposing and settling of her Portion, though that Portion rose from a collateral Relation?"

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might compel her to assign those Securities to them, though she was, at time of the Marriage, an Infant."

" There may, indeed, be some distinction; for if there was any Collusion in making a Jointure, merely to bar her Dower, and not to make a Provision for her, suitable to her Fortune and Quality, these circumstances might alter the determination of a Court of Equity. The present Case, indeed, is that of an " Agreement" only for a Jointure; but that will make no difference in Equity, as things contracted to be done, are considered as done, and Marriage Articles are usually, in

" Most Portions arise from Settlements, of which the Children are Purchasers, and not in the power of the Father. No instance of a private Act of Parliament applied for to settle such a money Portion."

" Third Objection. Suppose this might be done as to vested Portions, because they are in the power of the Husband; yet not as to contingent Interests, because these are not in the power of the Husband."

" I will not enter now into the Question about the Husband's power to dispose of the possibilities of the Wife.—Theobald and Duffay goes a great way; but it would be very extraordinary and mischievous to say, the Father could not do it. Many Portions, arising under Marriage Settlements of Fathers, are contingent; sometimes depend upon Survivorship, and the Contracts concerning them are to prevent that absolute power the Husband would have over them, when they became vested; the Objection relied upon, takes its rise from the event having fallen out one way, that is, the Husband dying before the Contingency."

" But suppose Mr. Ashley had died during the Life of Mr. Pitfield, and no care taken or Provision had been made about this share of the surplus. All Agreements of this kind are made to prevent the power and right of the Husband arising from the Marriage; and it would be most dangerous for a Court of Justice to enter into the Question, whether they are more or less beneficial for the Infant. As I said at first, I know no precedent where a Marriage Settlement of this kind has been called in Question in this Court; but Cases have been, where Agreements have been entered into by Infants, with the consent of their Guardians, or by Guardians on their behalf, which this Court would not suffer to be broke in upon."

" As to so much of the Bill as seeks to set aside or otherwise break in upon the Settlement dated 29th June 1737, made on the Marriage of DOROTHY with CHARLES PITFIELD, her former Husband, let it be

" DISMISSED."

in Courts of Equity, strongly supported: the Court will certainly compel the Heir to perform them; and the Wife is considered as fully by them as by an actual Jointure. This is agreeable to the reason of the Case of *Blow v. Lady Hereford*, 2 Vernon, 501."

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In the Case of *Harvey v. Ashley*, Sir Dudley Ryder was Counsel for the Infant; and the Case of *Price v. Seys* being cited, he says, "As to *Price v. Seys*, the Dower being barred is no more than the effect of the Statute of Jointures, which makes all Jointures of Infants, as well as of Women of full age, a Bar." It is there taken for granted, by one of the greatest Lawyers that ever was in Westminster Hall, that it was a settled point; and laudable as his zeal was for all his Clients, yet the conviction of his own mind was so strong, that he did not make the least effort to controul it.

The Opinion, which was given upon great deliberation, has been so fully stated already, I will not repeat it: and I take upon myself to say, that no man at the Bar entertained the least doubt of the legality of that Opinion.

As to the Case of *Cray v. Willis*, I cannot find any Note of it taken by any body (a).

Sir

(a) This Case is very shortly stated in 9 Vin. Abr. Tit. *Dower*, 2. 3. c. 18. By the Registers Book it appears to have been as follows:

Jeremiah and Elizabeth Cray, Infants - - - - - PLAINTIFFS.

AGAINST

James Willis, Mary Cray, Widow, and others - - - - - DEFENDANTS.

The Plaintiffs, as the Infant Children of *Jeremiah Cray*, deceased, filed their Bill in the Court of Chancery, against *James Willis, Mary Cray*, the Widow and Administratrix of the said *Jeremiah*, and others; stating, "inter alia," that the said *Jeremiah Cray* died:

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Sir Dudley Ryder was then Solicitor General, and most probably in the Cause, or at least must have heard it; and though very minute in

in 1731, intestate, possessed of real and personal Estate, leaving the Plaintiff *Jeremiah* his Heir at Law, and the Plaintiff *Elizabeth*, his only Daughter (both Infants) the Defendant *Mary Cray*, his Widow, and Mother-in-Law to the Plaintiffs, four Brothers (one of whom was dead) and three Sisters, all Infants, and that the Defendant *James Willis* had been employed by the Intestate as his Steward; and praying that the Defendants *Mary Cray* and *James Willis*, might account for the Personal Estate and Rents come to their hands. The Defendant *Mary Cray*, by her Answer, admitted the relationship, and that the Intestate left her with child, which was afterward born a Daughter, named *Mary Carne Cray*, and stated that the Intestate, before her Marriage (she being then under age) by Indenture charged several of his real Estates with an Annuity of £. 200 to her for Life, and after her Death, upon trust, to raise a like Sum yearly, and pay it amongst the Children of the Marriage; but that in the said Indenture, the same was not agreed to be in Bar of Dower: and therefore she hoped she should not be concluded thereby, but have her option, either to abide by the said Settlement, or take her Dower, whichever should appear most for her advantage. The Defendant *James Willis* admitted his employment, and set out an account. The Defendants, the Infants, alleged, that the Intestate, as Administrator "de bonis non" of their late Father, possessed his personal Estate to the amount of £. 20,000. The Defendant *Samuel Cray* alleged, that *Elizabeth Cray*, his late Mother, gave the residue of her personal Estate (of the value of £. 7,000) to him and *Hannah*, his Sister, since deceased, and made them Executors; but that they being Infants, Administration was granted to the Intestate during their Minority. AND the Cause coming on to be heard at the Rolls, on the 14th May 1734, his HONOUR DECREED and ORDERED, that the Plaintiffs do bring an Administration to *John, Mary, Elizabeth, and Hannah Cray*, before the Master (Holford) who was to see what Claims the Defendants had on the Intestate's Estate; and that the Defendants, the Widow and *James Willis*, should come to an Account for the Personal Estate come to their hands, and that the clear residue should be divided into three parts, one to be retained by the Widow, and the remaining two-thirds to be subdivided into thirds, whereof the Plaintiffs should each have one, and the remaining third to be subdivided into thirds amongst the Plaintiffs and the Widow. And that the Receiver should be continued, and pass his Accounts annually before the Master, who was to see what was the annual value of the Estate; and when the same should be seen, the Defendant *Mary Cray*, was to make her Election, before the Master, whether to abide by her Jointure of £. 200 a year, or waive it and take her Dower; and if she should elect to take her Dower, the Master was to assign her her Dower, out of the Intestate's real Estates, and see what was due to her on account thereof, which was to be paid by the Receiver out of the Rents.

in his Notes, upon every thing which passed in Court, yet there is not the least notice taken of it in his Note Books. And if this point had been debated, or it had been considered as any authority, it is almost impossible to conceive that the two Cases, of Price and Seys, and Harvey and Ashley, should not have produced it.

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It must have been a Case which passed "sub silentio;" and though the Answer mentions the Wife being under age when the Jointure was made, yet the reason insisted upon by the Answer, as stated in the Decree, was, "that it was not agreed to be in Bar of Dower;" and she therefore hopes she shall not be concluded thereby, but "have her option, either to abide by the said Settlement, or take her Dower, which she thinks most to her advantage." And neither the Answer nor the Decree puts her Right of Election upon her Infancy. It seems to have proceeded upon an apprehension, that a Jointure, within the Statute, must be mentioned in the Deed to be in Bar of Dower. But if such a Construction had been given upon the maturest deliberation, it is not to be opposed against the Opinion that has been cited.

As therefore the words and reason of the Law, the manifest and clear intention of the Legislature, (evidenced by the Proviso) the subject matter of the Right, springing out of a Contract they were capable of making, all conspire to make the Bar operate upon Infants as well as adult Persons; As it would check the most advantageous Marriages they could make, if they were to have the Election contended for; (for a Jointure, fairly made, is a much more beneficial Interest than Dower; and if it is fraudulently made, there is strength enough in the Common Law to controul it; and by a Conveyance to Trus-

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tees before Marriage, or by a strict Settlement with Power of Revocation, the Right of Dower may always be defeated :) As the construction I put upon this Act can never operate to the prejudice of Infants, but, by enabling them to marry into the greatest Families and Fortunes in the Kingdom, must frequently operate to their advantage; As this construction has been sanctified by the Practice of two Centuries, and the Opinion of the greatest Magistrates, I will conclude with a Question asked by Camillus in Livy :

“ Quæ ratio est expertis alia experiri ? ”

Mr. Baron GOULD, Lord Chief Baron PARKER, and Lord Chief Justice PRATT, delivered their Opinions in the Negative; Mr. Justice BATHURST, Mr. Baron ADAMS, and Mr. Baron SMYTHE, with Mr. Justice WILMOT, in the Affirmative (*a*).

WHEREUPON,

(*a*) It appears from a MS. Note of Mr. Justice WILMOT, that Lord HARDWICKE and Lord MANSFIELD were of Opinion with the majority of the Judges; and that Lord Mansfield said, “ The general Question is, if Lady DRURY, having the Provision stipulated for her by her Marriage Articles, is not barred of her Dower. That Infants are not bound by their Agreements, was never held universally any where in the world: by our Law, some bind absolutely, some are void, some are voidable. If the transaction were fair, a bargain and sale of lands by an Infant for necessaries would be good: if an Infant pays money with his own hand, without a valuable Consideration, he cannot get it back again; if he receives Rents, he cannot demand them again when of age. What then is the Agreement in this Case, and what are the circumstances of it? It is an Agreement in order to the Infant's advancement; Marriage is so. What sort of a Marriage? With the Consent of her Father and Guardian. Lady DRURY was then near twenty-one: there is no objection as to the fairness of the transaction. She had only £. 2,000 for her fortune; it was an advantageous bargain for her at the time Better terms may be obtained for Infants, by Parents and Guardians, than when they are of full age:

WHEREUPON, and upon due consideration and debate of what had been offered on either side in this Cause,

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It was ORDERED, That so much of the said Decree complained of by the said Appeal, whereby an account is directed to be taken of the Personal Estate of the Intestate Sir THOMAS DRURY, &c. be AFFIRMED, and that the Residue of the said Decree be REVERSED: and it is hereby declared, that the Respondent is bound by the Agreement entered into in consideration of and previous to her Marriage with the said Sir THOMAS DRURY, and that the same ought to be performed and carried into Execution, and that the Respondent is thereby barred of her Dower, and of any Share of the said Sir THOMAS DRURY's Personal Estate, under the Statute for the Distribution of Intestate's Estates.

by much the greatest number of women are married Infants; but they are not to be an instrument to defraud others—no difference if premeditated Fraud, or it turns into a Fraud. If the Statute of Hen. VIII. had never been made, Courts of Equity would have given Relief; but I am most clearly of Opinion, that Infants are barred under that Statute: That Act was made for Uses, not for Jointures; this is a Provision arising out of the general consequences of Uses . . . Then consider the usage and transactions of mankind upon it: the object of all Laws with regard to real Property is quiet and repose. As to practice, the greatest Conveyancers, the whole profession of the Law; Sir Orlando Bridgeman—Lord Nottingham—there was not a doubt at the Bar in Harvey and Ashley. Mr. Fazakerly always took it for granted, that Infants were bound. The Usage began on a legal Determination within thirty years after the Statute. Marriage Settlements would be totally subverted without the interposition of the Legislature; and I concur with Lord Hardwicke in Opinion, that no man living could draw such an Act of Parliament. I never will put such an exposition on the Law, as to make it necessary to apply to Parliament to rectify it."

IN THE KING'S BENCH.

BADDELEY AGAINST LEPPINGWELL.

Trin. & Geo.
III. 1764. v.
3 Burr 1533.
Baddeley
against
Leppingwell.

THIS was an Action of Trespafs, for breaking and entering the Plaintiff's Close. The Defendant pleaded, 1st. The general Issue, "not guilty;" and 2dly. a Justification under a Grant in Fee from the Lord of the Manor of Hedingham Borough, in the County of Essex, on the 10th December 1761. Plaintiff replied, that before the said Grant, viz. on 3d July 1754, the Lord granted the said Close to the Plaintiff and her Sister Ellen, and their Heirs in Coparcenary: that Ellen died, and afterwards, on the 24th June 1756, the Lord granted her Moiety to the Plaintiff in Fee. The Defendant rejoined, and insisted on his Title, under the Grant to him of the 10th December 1761; upon which Issue was joined.

The Cause was tried at the Lent Assizes for Essex, in 1764, before Mr. Justice BATHURST.

The Trespafs was proved upon the Issue taken on the Plea of "not guilty;" and upon the second Issue, a special Case was reserved, to the following effect:

THOMAS IVES, being seised of this Copyhold Estate, and having surrendered the same, by his Will devised it to SARAH BOREHAM: The words in his Will, upon which the Case turned, were as follows: "I give to CLEMENT BOREHAM, the House I now live in, for his
" natural.

“ natural Life, he paying thereout 40s. a year to ROBERT BOREHAM.—I give and bequeath my two Copyhold Tenements, &c. (being the Premises in question) to SARAH BOREHAM, she paying thereout 40s. a year to her Sister ELIZABETH BOREHAM.”—

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SARAH BOREHAM, by her Will, dated 4th June 1744, devised the Premises to ELIZABETH, her Sister, in Fee. ELIZABETH married one BADDELEY, and had Issue by him the Plaintiff, and her Sister ELLEN. ELLEN died an Infant, and upon her Death, her Moiety came to the Plaintiff.

On the part of the Defendant, it was contended, that THOMAS IVES did not devise the Estate to SARAH BOREHAM, in Fee; but only for her Life; and that the Reversion descended upon his Heir at Law. That he had a Brother named JOHN; that JOHN left a Son THOMAS, who surrendered to the Defendant LEPPINGWELL, and that the Devise to SARAH BOREHAM, being for Life only, Defendant was intitled to the Estate under THOMAS, the Heir at Law.

The Plaintiff, in answer to this Defence, insisted, first, that SARAH BOREHAM took the Fee under the Will of THOMAS IVES; and secondly, that if she did not, yet, as the Issue was joined upon the Fact of the Grant made to her and her Sister ELLEN, the operation and validity of the Grant could not be controverted upon this Issue.

The Questions submitted to the Court were,

- 1st.—Whether SARAH BOREHAM took an Estate in Fee, or for Life only, under the Will of THOMAS IVES?
- 2d.—If she took an Estate for Life only, whether Defendant could take advantage thereof on the Issue joined?

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Mr. LEIGH for the Plaintiff contended (on the 1st. Question) that where a Testator lays such a Charge upon the Estate devised, as may render it a burthen to the Devisee in any year, the Devisee shall take in Fee; and that in the present Case, SARAH the Devisee may be a loser by the Devise, unless she takes a Fee; for the Annuity is not restrained to SARAH's own Life, but is a continuing Annuity: and he cited the Case of *Reed v. Hatton.* 2 Mod. 25.

And on the 2d Question. As this is merely a possessory Action, it is not necessary for the Plaintiff to set out a Title, unless the Defendant had set out one himself, which he has not done. The prior Grant to THOMAS IVES, set forth in the Rejoinder, ought to have been "specially" pleaded: but Defendant has only traversed the Grant to the Plaintiff, by which only the legal operation of the Grant, not the Plaintiff's Title, is put in Issue. He cannot, upon this Traverse, go into the Title of THOMAS IVES, or give Evidence of any thing foreign to the Point in Issue. The Plaintiff could not tell how to direct her Evidence; for Defendant might as well claim under any other person as THOMAS IVES. The Issue being taken on the Grant, it is enough for us to prove the Admission, which we did prove. If the Defendant could have invalidated it, that ought to have been by pleading "specially."

Mr. ASHURST, for the Defendant, admitted that where a Devisee is charged with the Payment of a Sum in gross, he shall have a Fee, though the Estate be not devised to him "and his Heirs;" but an annual Payment, "out of" the thing devised, will not create a Fee; because the Devisee cannot lose by the Devise. Here the value of the Estate devised is £. 5. 6s. per annum, and the Charge is only

40*s.* per annum; therefore, the Devisee was sure not to be a loser.

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And as to the 2d Question, That upon this Traverse nothing but the effect of the Grant can be controverted. The Pleading in Cases of Freehold is different from that in Cases of Copyholds. A Copyholder, in the Eye of the Law, has only an Estate at Will, and he may alledge an Admittance as a Grant. The Lord can only transfer an Estate according to the Surrender: if he exceed this Authority, his Admittance is good only "pro tanto." Now, if SARAH BOREHAM was, as we contend, only Tenant for Life, she had no Estate which she could devise at her death; consequently the Admission of the Plaintiff and her Sister ELLEN is, in effect, a Grant of "nothing." The Defendant therefore in his Rejoinder denies that the Lord granted the Estate, and shews a Title in himself: and as the Plaintiff, being a Copyholder, could not plead a Title, but could only plead it as a Grant from the Lord, the Defendant could only traverse the Grant, which he has done; and having traversed the Plaintiff's Title, he properly sets up his own.

MR. LEIGH in reply insisted that the Charge of the Annuity might have continued longer than the Devisee's life, and therefore the Devise might have been prejudicial; and relied on the Case of *Ansley v. Chapman*, in Cro. Cha. 157. and *Reed v. Hatton*, before cited, and on *Lee v. Stephens*, et al. 2 Shower, 49. where a Devise to James, conditionally, that he should "allow to Nicholas, meat, drink, &c. during his life," was adjudged a Fee. He likewise cited *Humberton v. Howgill*, in Hobart, 72. The present Devise, he said, was intended as a Provision for both Sisters, and it was not meant that the Annuity should cease upon the death of SARAH; and it was payable
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out of the Estate, not out of the Rents: and as to the second point, that the Defendant could not put the Plaintiff to shew any other Title, than the Grant of the Lord: the difference of Pleading is only in point of Form.

Lord Mansfield and Mr. Justice Dennison being both absent, Mr. Justice WILMOT on this day (a) declared the Opinion of the Court:

(a) 9th July
1764.

There are two points referred to the Court;

1st.—Whether SARAH BOREHAM took an Estate in Fee, or for Life, under the Will of THOMAS IVES?

2d.—If only for Life, whether the Defendant could take any advantage of the Plaintiff's want of Title upon the Issue joined on these Pleadings?

The first Question is the material one; for if she took a Fee, the Lord's Grant to the Plaintiff and ELLEN her Sister, and their Admittance, would operate as a Grant of the Fee; and we think SARAH BOREHAM took a Fee under the Will of THOMAS IVES.

The Case upon the Will is simply this: THOMAS IVES, seised of a House in which he lived, and of two Copyhold Tenements, which he had surrendered to the use of his Will, and having a Daughter, ELIZABETH BOREHAM, and many Grand-Children, of which SARAH the Devisee was one, made his Will, dated the 3d December 1740, by which he devises the House to CLEMENT BOREHAM for his Life, “ he paying thereout 40s. per annum to ROBERT BOREHAM, the “ Testator's Grandson,” and after CLEMENT BOREHAM's Decease, to be equally divided between ROBERT, SABIL, and JEREMIAH BOREHAM, the Children of ROBERT BOREHAM, deceased (who were his Grandsons); and he gave his two Copyhold Tenements to SARAH BOREHAM, “ she paying thereout 40s. per annum to her Sister ELI-

ZABETH

ZABETH BOREHAM:” then he gave £.40. between his two Grand-daughters, **ANNE** and **MARY BOREHAM**, and made several other Bequests.

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The Principle upon which all Cases, arising on the Construction of Wills, must depend, is admitted by the Counsel on both sides, viz. That the Intention of the Testator is to be collected from the whole Will considered together, and such a Construction to be made as will effectuate that Intention. But that collection and inference must be drawn from the Will itself, “*ex visceribus Testamenti*,” and all wanton, arbitrary, whimsical conjectures of Intention, are to be banished from the mind, when it is to judge upon such a Question; for though the Intention need not be evidenced by a “necessary implication,” as in the Case mentioned out of Vaughan; yet it must be a clear, apparent Intention, evidenced by the words of the Will, in such a manner as to leave the mind quite satisfied of that Volition of the Testator; and therefore let him use what words or expressions he will, if they disclose what he means, it is the Law to his Family, and must be obeyed; and the indulgence which the Law shews to this kind of Instrument, is owing partly to the words of the Act of Parliament, which enables persons to devise at their will and pleasure, and partly in respect of the situation which men are in when they make their Wills, incapable of getting advice; and therefore the Law delivers them from the Vassalage of Form and technical words, and only expects that their meaning should be told in writing.

As this is the Principle, and the only difficulty lies in the Application of it, other Cases, unless they were the same in all circumstances, rather obscure than illuminate these kinds of Questions. When the mind is in pursuit of the Testator’s Intention, dissimilar Cases are

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“ Ignis fatui,” that mislead the mind, instead of directing it; and therefore the Counsel very properly avoided loading their Arguments with multitudes of Cases, and only mentioned two or three, which came the nearest to the Case in question, and which I will take notice of presently; and the Counsel have put the Question upon its proper point, viz. Whether an apparent Intention to give the Fee, can be collected from the “ words” of this Will?

I collect that Intention from the different penning of the Devise to CLEMENT BOREHAM, with the limitation over upon it, and of the Devise to SARAH BOREHAM.

When the Testator meant to give an Estate for Life, he has said so; and has expressed that Intention very particularly by words apt and proper for that purpose, “ for and during the term of his natural Life, paying thereout 40 s. a year to his Grandson ROBERT;” and finding, from that partial Disposition, that he had something left in him still to give, he devises that House, after the death of CLEMENT BOREHAM, to be equally divided between ROBERT and JEREMIAH BOREHAM; but in the Devise to SARAH, he omits the words “ for and during the term of her Life,” which he would certainly have inserted if he had intended it.

This difference of expression paints the Distinction which his mind had taken between giving part of his Estate in the thing devised, and his whole Interest in it: the Devise to SARAH follows the Devise to CLEMENT immediately: if he wrote, he could not but see them; if read to him, he must have heard the sound of the words; all rested with him. For though a Devise to A. generally, unassisted by other Clauses which mark the Intention, would give only an Estate for Life, yet it is plain the Testator did not think so; for if he had, it was
+ quite

quite unnecessary and nugatory to have inserted the restrictive words " for Life." This is therefore one decisive mark drawn from the Will itself, to shew that when the Testator meant to give an Estate for Life, he said so ; and consequently, that when he gave the thing generally, he did not mean an Estate for Life only ; and indeed I believe all men, unacquainted with the Law, when they mean a Restriction, they express it ; and when they give the thing generally, they mean the absolute property of the Land, as much as of a personal Chattel ; and the Custom of devising which prevailed antecedent to the 32 Hen. VIII. and was a Relic of the Saxon Law, was to devise Lands, " ut Bona et Catalla."

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Another circumstance of Intention is, limiting the Estate over upon the first Devise, where it is expressly given for Life, and making no Limitation over upon the second ; indeed he might intend to limit a Remainder over on one Estate and not on the other, and therefore this alone would not be sufficient to warrant the inference of a different Intention ; but still it strengthens the other Evidence, and acts as an auxiliary proof of the Intention.

But the most material passage in the Will, from whence I collect the Intention, is the Condition of paying the Annuity to ELIZABETH BOREHAM.

Mr. ASHURST very forcibly urged, that the word " thereout," is a very emphatical word, and brings the Case directly within the distinction in Collier's Case, 6 Co. that where the Condition is to pay generally, there the Fee will pass, by reason of the possibility of Loss ; but where the sum is to be paid out of the Rent and Profits, then, as there is no possibility of a Loss, because he is not to pay till he has received, there it will not enlarge the legal operation of the de-

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vising words and give a Fee ; and that the word “ thereout ” is equivalent to faying, out of the Rents and Profits ; and I think it is, and if it had been a sum in Gross, it would have been a very different Question.

How far the different penning of the two Clauses which I have already mentioned, might have influenced the Question, independent of the Condition, is a matter of speculation, not worth debating ; for here it is not a sum of money in Gross, but an Annuity to the Devisee’s Sisters, who were both Grand Daughters of the Testator : They both stood in an equal degree of Relation to him, and it is manifest he was providing for them both : It is impossible to conceive he meant to make the Provision for one Grand Daughter to depend upon the Life of another, and to disinherit his own Grand Child in favour of his Brother : and especially when by a subsequent Clause in his Will, he gives £. 20 a piece to two other of his Grand Daughters, ANN and MARY BOREHAM ; That Bequest gives them the absolute property in that money, and that Legacy is equal in value to the Annuity at the rate of 10 years Purchase ; and as he seems to have aimed at an Equality, the pecuniary Legatees would be sure of £. 20, whereas ELIZABETH might have nothing if Sarah died within the year : And it would be directly contradicting the legal operation of the words in the Will, and the very construction which words of the same import ought to have as to SARAH BOREHAM. For the Defendant admits and insists that the devise to SARAH BOREHAM gives her an Estate for Life : if so, why will not the Devise of the Annuity to ELIZABETH BOREHAM give her a Life estate in the Annuity ? and if it does, SARAH must take the Fee. For the Security must be intended to answer the thing secured : The Annuity cannot come out of the thing devised as long as the Annui-
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tant lives, unless the Devisee takes the Inheritance, and it really almost amounts to a necessary implication: For if an Estate is given to a particular person, and an act directed to be done with that Estate, or any payment to be made out of it, which cannot be done but by vesting the Inheritance in the first Devisee, it must necessarily give the Inheritance, and is divided by very thin partitions from a necessary implication; it is certainly a violent presumption, which Lord Coke says, 1 Inst. 6. is “plena probatio;” and a full proof of Intention, out of the Will itself, is the proof which the mind is to pursue and to endeavour to attain; and it is something like the Case of Shaw and Weigh, 10 Geo. I. 1 Eq. Ca. Ab. 184. where an Estate was devised to Trustees generally, without any words of Inheritance; but it was upon Trusts and to support Estates which required an Estate of Inheritance in the Trustees, and therefore it was held to give it; and the Case cited by Mr. LEIGH of Reed and Hatton, 2 Mod. 25. comes near this Case, but it is not exactly the same; so far it resembles it, that the House is given upon Condition that he pay unto his Sisters £.5 a year: The word “paying” in this Case makes a Condition, and is exactly the same as the words in that Case, “upon condition that he pay:” But in that Case the payment is not directed to be made out of the Estate, but quarterly; and the first payment might be in one month after the Testator’s Decease, and before Robert could have received any Profit; and therefore the possibility of a Loss was an ingredient in that Case; but still the Case applies to prove that they took the annuity for their Lives under the words “upon Condition that he pay to his Sisters £.5 a year.” For what the Court says does not prove, as Mr. ASHURST contends, that they were given for Lives expressly, but must be taken as their sense of the operation of the words marked in

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Italics, and could be printed in that Letter for no other purpose but to inform the Reader that those were the very words of the Will; and the Court relies upon those words, as plainly proving that the Testator intended the Devisee a Fee simple.

The Case in Cro. Cha. 157. *Anley v. Chapman*, was cited by Mr. ASHURST to meet this Objection. There was a Devise of Lands by several Clauses to several Sons, and particularly to Michael and Henry; then the Testator declares that they shall bear a proportionable part of £. 40 a year to his Wife for Life; and yet the Court held that Payment did not enlarge their Estates into a Fee: But Mr. LEIGH gave the true Answer: The Charge was not made for the Wife by the Will; for it recites a prior Obligation to pay it, and therefore the Payment did not at all depend upon the duration of the Estates which the Sons took under the Will. Mr. ASHURST did endeavour to take off the force of the Argument arising from the Devise of this Annuity, by observing that the Annuity, in the first Devise, determined with the Life of the Devisee who was directed to pay it, and if he meant it in that Devise, he might also mean it in the other: But the Annuitant is one of the Persons to whom the Estate is limited in Remainder, for as there is no other of that name mentioned in the Will, they must be intended to be the same: But if not the same, there is a very essential Difference between the Cases: The Estate is expressly given for Life to the Devisee in the first Clause; whereas in the second, it is given generally; the words in the first Clause must controul any presumption of Intention in the one Case; but because he hath framed his Devise in such a manner in one Case that the Annuity must drop with it, there is no foundation to infer, that where he has framed the Devise in a different manner in another Case, that he intended the Annuity should drop

drop with it. The Reverse is rather to be presumed, and that if he had had the same intention in both, he would have expressed himself in the same manner.

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As we think SARAH BOREHAM took a Fee simple under the will of THOMAS IVES, and consequently, that the Plaintiff and ELLEN had the Fee when they were admitted by the Lord, the Question upon the pleadings becomes quite immaterial; but if the fact was, as the Case states it, that THOMAS IVES, as the Nephew and Heir of the Testator, was entitled to this Copyhold Estate, in case SARAH took only an Estate for Life; and consequently, that the Defendant LEPPINGWELL under him, and as his Surrenderee, had the legal Title to this Estate, I should have thought that upon this Issue, the Grant of the Lord to the Plaintiff and ELLEN, would have been a mere nullity, and that the Plaintiff's proving the fact of the Grant, without any right at all, would not have proved the Issue against the Defendant's having the real right to the Estate.

Originally Copyholders were mere Tenants at will, a class of middle men between Freeholders and Villeins; free as to their Persons; but not as to their Estates; inferior to Freeholders, who were free both as to their Persons and Estates; superior to Villeins, who were free neither as to their Persons nor Estates; and in very ancient times, the word Freehold, was meant to describe an Estate which could not be taken away by the Lord, in opposition to every other species of Estate, which always lay at the mercy of the Lord: By degrees, this species of Estate acquired a stability; Custom, which is immemorial Usage, clothed it with one material quality, analogous to a Freehold Estate, viz. that the Lord should not "ad libitum" resume it; that the Heir, where it was a Copyhold of Inheritance, should be entitled to the Estate, paying a Fine, certain or uncertain,
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“according to the Custom of the Manor,” upon his Admittance; and the Fine not being due till Admittance, it became the Lord’s interest to admit him; but still the Admittance gives no right, and even in the Case of a Surrender, the Estate acquired by the Surrender depends entirely upon the Right which the Surrenderor had at the time of the Admittance: The Lord, in both Cases, is a mere Instrument, and the only difference between an Admittance on a Descent and a Surrender is, that it is necessary, in the one Case, to entitle the Lord to his Fine, and it is necessary, in the other, both to take the Estate out of the Surrenderor, and also to entitle the Lord to his Fine; but, in either Case, no Estate really passes from the Lord; and even after the Surrender, and before the Admittance, the Estate remains in the Surrenderor, and is not vested at all in the Lord, not even in “transitu,” between the Surrender and Admittance; and though every Admittance may be pleaded as a Grant, yet it really operates as a Grant only in respect of the Lord, and against his Right as Lord; for to every other person and purpose whatsoever, it is valid or void according to the Right of the Parties. The Surrender controuls the Admittance in all Cases whatever; if the Surrender is for Life, and the Admittance in Fee, the Estate of the Copyholder is according to the Surrender, and not according to the Admittance: So if the Lord admits A. and B, where the Surrender is only to A, the whole Estate is in A; or if the Surrender is absolute, and the Lord admits upon Condition, the Condition is void; the reason given is, because the Lord has only a customary power to admit, according to the Surrender, and so far as he exceeds that power, the Act is void. 4 Co. 28. b. In the Case of a Descent, the Admittance is of still less validity, for it is not so much as necessary to complete the Title; and

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and if the Lord admits twenty different persons as Heirs at Law, the unadmitted real Heir at Law will have a good Title against them all; and the Grant in the present Case is stated expressly to have been made to the Plaintiff and her sister Ellen, in "Coparcenary," which shews the nature of this Grant; and therefore if they had no Title as Heirs at Law, the Grant and Admittance were totally void, and the Defendant could traverse nothing else but the Grant; for the Allegation, "by virtue whereof they were seised," is not a matter traversable; but the Traverse is taken properly to the Grant, which puts the Right of the Copyholder properly in Issue; and the Grant is good or void, and the Plea proved or disproved, as that Right is determined.

As to the Case of Humberton and Howgill, in Hob. 72, where it is said, "if Issue be taken directly, enfeoffed or not enfeoffed, it must be avoided by Covin specially pleaded, for it is a Feoffment tiel quel." 1st. This was not the point of the Case: but, 2dly. The Feoffment was good to every intent and purpose, except as against Creditors; whereas, in the present Case, it is void against every body; for even the Lord himself may admit the real owner, and the first Admittance will not defeat or frustrate the second. And in that Case, if Feoffment by a person incapable from the nature of the estate, or other incapacity, which renders the act totally void,—it would prove the Plea. It is then said, that a possessory Action is not sufficient to destroy the Plaintiff's Title. 4 Rep. 71. 6 Co. 15. He must shew the Title in himself, and he relies only on the Grant of the Lord.

But if Sarah Boreham took only a Life Estate, Leppingwell had a Title under the Heir at Law, and then the Grant of the Lord to him is substantiated; and though Possession is sufficient against a

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wrong-doer, yet it is not against the real owner, who has a Right of Entry, which would be the present Case, if Thomas, the Nephew, was the customary Heir: if he was not, then the Defendant is an entire stranger and wrong-doer, and the Plaintiff's Possession would enable her to maintain the Action, and the Merits would be against the Defendant upon both the Questions; but as the Law is clearly with the Plaintiff on the 1st Question, she is entitled to the

POSTEA.

IN THE KING'S BENCH.

THE KING AGAINST ALMON.

Mr. Justice WILMOT (*a.*)

THIS is an Application made to the Court by the Attorney General, for an Attachment against Mr. ALMON, for publishing a Pamphlet, containing many libellous passages upon this Court, and upon the Chief Justice for his Conduct both in Court and out of it: and it charges the Court, and particularly the Chief Justice, with having introduced a method of Proceeding to deprive the Subject of the benefit of the Habeas Corpus Act; and though the Chief Justice is
named

Hil. 5 Geo.
III. 1765.
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(*a*) This Opinion was not delivered in Court, the Prosecution having been dropped, in consequence, it is supposed, of the Resignation of the then Attorney General, Sir Fletcher Norton; but it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved. The occasion of it was a Motion in the Court of King's Bench, by the Attorney General, for an Attachment against Mr. ALMON, for publishing a Pamphlet, intituled, "A Letter concerning Libels, Warrants, Seizure of Papers, &c. Printed for J. ALMON, Piccadilly, 1765."

In consequence of this Motion, grounded on Affidavits of the above Pamphlet having been bought at the Shop of Mr. ALMON, in Piccadilly, a Rule was made for Mr. ALMON, to "shew Cause" why a Writ of Attachment should not issue against him for his Contempt. In answer to these Affidavits Mr. Almon made an Affidavit, in which he expressed his "concern and surprize at this Charge, being no ways conscious of having in any act of his Life been guilty of the least intentional disrespect towards that Court,

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named and marked out in that Passage, yet the whole Court is most manifestly, and in express words, involved in it.

The Passage reflecting upon the Chief Justice for amending an Information out of Court, is in page 126, and is laid before the Court in this manner. Mr. Barlow, by Affidavit, informs the Court, that upon the 18th of February, he received directions from Mr. Wallace, to get an Information against Mr. Wilkes amended, by striking out the word "Purport," and inserting the word "Tenor:" that he applied to Lord Mansfield for a Summons, to shew Cause why it should not be amended, and sent two Copies of the Summons, one to Mr. Hughes, the Clerk in Court for the Defendant, and another to Mr. Phillips, the Solicitor for the Defendant, which he believes were left at their Houses. That on Monday, the 2d of February, he attended Lord Mansfield, and there met Mr. Hughes and Mr. Phillips; and Lord Mansfield then asked them what Objections they had to such Amendment: that they said they could not consent to it; and that Lord Mansfield said, he did not ask their Consent, but what their Objections were? and asked, if it was not usual, or the common Practice, to amend Informations? and read from a Book several Cases of Amendments, and then made an Order for the Amendment; and Mr. Hughes confirms the Account given by Mr. Barlow, of what passed at Lord Mansfield's when this Amendment was made.

"nor does he now, nor did he ever apprehend or understand that the Passage or Extract of the Pamphlet, intituled, "A Letter," &c. "was so meant or intended, or could be so construed."

As these Proceedings were afterwards dropped, they are not mentioned in the Reports of this Period; but it appears that this Opinion was prepared after the Argument on the Rule to "shew Cause," as it takes notice of the Arguments of Counsel, and of the Objection made to the granting of the Attachment.

But as the matter never came to a final Decision, it must be considered only as the Opinion of the Judge who gives it,

The

The Passage in this Pamphlet represents this Amendment to have been made by Lord Mansfield, "officiously, arbitrarily, and illegally."

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The Evidence laid before the Court, of Mr. ALMON's having published this Pamphlet, is an Affidavit made by David Bell, in which he swears that the Pamphlet was sold and delivered to him at Mr. ALMON's Shop, by a Woman belonging to Mr. ALMON, and that he paid her 1s. 6d. for it.

Three Objections have been made to the granting this Attachment.

1st. That in the mode of Prosecution, the Fact, sworn by Bell, doth not sufficiently evidence a Publication of the Pamphlet by Mr. ALMON, and that his Privity to the Publication ought to be proved.

2dly. That to warrant this "summary" mode of Proceeding, the Contempt ought to be clear and certain; that the Scandal ought to be self-evident and apparent, not to be made out by private Anecdotes and Inferences, or any nice ingenious subtle Interpretation; that it is the proper Province of a Jury to judge of the Application and Relation of a Libel; and that whether these Passages do or do not relate and apply to the Court, or the Chief Justice, would be much more proper for a Jury to exercise their Judgment upon than the Court.

3dly. But if both these Points should be against them, then it is insisted upon, that under all the circumstances of this Case, the Court ought not to proceed by way of Attachment, but leave the Offence to be prosecuted and punished by Indictment or Information.

As to the 1st Objection. I cannot find out that any distinction has ever been taken between Attachments and Informations, as to the Evidence

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Evidence expected by the Court for granting them. Demonstration is not required in either Case, but such a degree of Probability, as warrants the mind to form a conclusion of the Truth of the Fact proposed, and to act upon it.

The Fact, proposed here, is the Publication of this Pamphlet by Mr. ALMON.

The Evidence is, that it was sold in his Shop by a Woman belonging to him. What is the Inference that the mind draws from such a Sale? That it was sold under his Direction, for his Use, and with his Privity. Like all other probabilities, it may be answered and explained; but unless it is answered and explained, it rises so near to a certainty, that it produces in the mind that kind of Assent which is called Assurance; and upon that foundation Courts of Justice, as well as private men, must rest satisfied and contented as the best and only succedaneum to Demonstration; and this kind of Evidence has always been held sufficient to induce the Court to grant Informations for Libels.

In the King and Roberts, Mich. 8 Geo. II. it was laid down by Lord Hardwicke and the Court, to be the constant Evidence of the Publication of a Libel, that the person bought it in the Defendant's Shop: and as to the Objection which was made to its being bought from one who appeared to be a Servant, and not the Master himself; and that there might be some combination between the Buyer and Seller, in order to injure the Master; it was said, the proof of that lies upon the Master, if he would remove the general presumption of its being sold by his Privity and Direction; and that this species of Evidence has always been held sufficient to induce the Court to grant an Information. It is also now established and settled by a

multitude of Cases which might be adduced, and an uniform Practice in pursuance of them, that this Evidence is sufficient to prove a Publication by the Defendant, even upon a Trial.

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If it be sufficient to convict a man of Publication upon a Trial, "a fortiori," it must be sufficient to found a Proceeding upon, which is so far from convicting, that it only calls upon the Party to answer the Charge, and defers the whole Trial of that Charge to his own Oath.

And as Mr. ALMON has made an Affidavit himself in this Case, and does not deny his Privy to the Sale of this Pamphlet, it fortifies the presumption which the Law makes, and for these purposes very sufficiently evidences the Publication of this Pamphlet by him.

As to the 2d Objection, which respects the Application of the Passages, it is admitted, and indeed it is upon very rational grounds now most clearly settled, that it is totally immaterial in what particular form or mode of expression Calumny and Defamation are conveyed.

The use of Speaking and Writing, is to excite in the mind of the Hearer, or the Reader, the Idea entertained in the mind of the Speaker or Writer; and therefore, let the Speaker or Writer paint that idea how he will, and in what colours he pleases, still, if it produces an idea of Calumny and Defamation in the minds of the persons who hear or see it, it is a Picture which the Law forbids to be drawn under any form or under any disguise whatsoever; and Courts of Justice have for many years said, that they would not renounce their senses upon such occasions, but would see with the same eyes that all other people do.

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It is totally immaterial what Terms are made use of, whether affirmative, negative, past, present, future, ironical, hypothetical, or interrogatory; if they convey Scandal, Judges are bound to understand it in the plain, popular, and obvious sense which the words import, and not suffer the Slanderer to shelter himself by any delusive colouring whatsoever.

But really there is no Colouring at all in this Case, except making use of the future Tense instead of the preterperfect.

The Passages, 122 to 126, (a) contain a direct, plain, explicit Charge upon this Court, of an Intention to defeat the Habeas Corpus Act,

(a) " I hope we shall never see any Chief Justice, especially in that great Court of criminal Process, the King's Bench, who shall deny, or delay, the issuing one of these Writs (of Habeas Corpus) to any man who applies for it, but award the same instantly, upon the Prayer of any one, as a Writ of Right, to which the Subject is entitled for asking, by motion of course, without any Affidavit whatsoever. In many Cases, as, for example, in that of "close" Confinement, it may be impossible for the Party either to speak to a Friend, send a Letter, or make an Affidavit; and, consequently, if either be required by the Court, it will be a virtual denial of the Writ; it is a means of defeating the Habeas Corpus Act. The Requisition of an Affidavit, puts it likewise in the power of a Judge, to object to its Form or Contents, and to say the same is not full enough; and yet, before another can be had, the Party guilty of the violence, upon being apprized of what has passed, may, by means of this Delay, remove the Prisoner to some other place, or shuffie him into some other hands, nay, hurry him into a Ship and carry him to the East or West Indies, and then all attempt for Redress will come too late, and be in vain. An Application to the King's Bench for an Habeas Corpus in Term-time, used to be esteemed, I remember, a mere "Motion of course." "Our Inheritance is right of Process of the Law, as well as in judgment of the Law." The condition of the subject would be still worse, if any Chief Justice, instead of granting the Writ prayed for, should force the Party into the taking of a Rule upon the Imprisoner, to shew cause why he detained the person imprisoned; and this last miserable remedy would still be rendered less adequate, if the person applying was obliged to give notice of such Rule to the Solicitor of the Treasury, as well as to the person imprisoning; and even this again would be still made more grievous, tedious, and precarious, if the Judge should

Act, by introducing a Rule to be attained by an Affidavit, instead of granting the Writ "of course," and averring that a man was two years obtaining his Liberty under one of these Rules. The Passages expressly mention the Chief Justice in that great Court of Criminal Process, the King's Bench, in "apertâ Curiâ."

should be critical upon the Affidavit of the service of Notice, and be extremely rigid in its being most punctually set forth in every the minutest circumstance. What a noble field for delay, evasion, and final disappointment, would this open to every committer of violence; and how easy would it be, in the mean time, to dodge the man imprisoned from place to place, and from hand to hand, so as to render it utterly impracticable for any friend to procure his enlargement. A bold and daring Minister might thus easily transport a troublesome, prating fellow, to either India, long before any "Cause could be shewn" upon such a Rule. I am informed, that a Freeholder, pressed for a Soldier under a temporary Act of Parliament, was two years obtaining his Liberty under one of these Rules; although he did his utmost by Money and Counsel, during all the time, to push on the hearing of his Case upon the merits: indeed he had the great good fortune not to have his Regiment removed farther than from Falmouth to Carlisle, in the whole time; for, had it been ordered abroad, I do not see how he could have had any Relief at all, until the end of the war; before which he might have died of diseases, or been knocked on the head by the enemy. But it would be even still much worse, if any Judge should take it into his head for six months together, that Noblemen were so great as to be privileged from paying obedience to a Habeas Corpus at all."

"Or, if any Chief Justice, contrary to the usage of Judges, who are to have no ears for any thing that is to come in Judgment before them, until the same is brought on judicially, should, weeks before any Crown-trial, officiously send for the Proceedings to see whether they were legal, and upon discovering an Error on the Prosecutor's side, should summon the Attorney of the other side, and tell him he must consent to the setting right of this Error, to the end that the "tenor" of the pleading might be such as Judgment could be pronounced thereupon; and, notwithstanding the Attorney should protest he could not consent thereto upon the account of his Client, and that the same was a criminal Prosecution, and that such alteration of the Record was not warranted by any adjudged Precedent, should nevertheless arbitrarily direct it to be done, without either having the Point debated before himself by Counsel, or brought on before the whole Court for their Opinion; and that the Defendant, being found guilty by the Jury, should be deprived, by such Amendment, of taking advantage of the Error aforesaid, in Arrest of Judgment, which he might otherwise have done, and the same would have been fatal to the Prosecutor. &c. &c."

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And as the Chief Justice can neither deny nor delay the issuing of an Habeas Corpus, without the concurrence of the other Judges, it is imputing that denial or delaying to them. But it does not rest there, for it says, "if speaking to a Friend, sending a Letter, or making an Affidavit, be required by the Court, it will be a virtual denial of the Writ;" which is saying that, by requiring an Affidavit, they have virtually denied the Writ; "that it is a means of defeating the Habeas Corpus Act; that an Application for an Habeas Corpus used to be a Motion of course;" that the Condition of the Subject would be still worse, if any Chief Justice, instead of granting the Writ, should force the Party into a Rule, and that Notice of such Rule should be given to the Solicitor of the Treasury; if any Judge should be of opinion that Noblemen were privileged from paying obedience to the Habeas Corpus; and that a Peer could not be attached by the King's Bench, for treating the Court with opprobrious language."

What Innuendo, Inference, Deduction, nice and subtle or ingenious Interpretation is to be made, for applying this to the Court and the Chief Justice? What Anecdote is to be known, unless the Proceedings in this Court are Anecdotes, and the Records of it are Secrets and Mysteries, impervious to human eyes, and unknown even to the Judges themselves.

As to the other Passages relating to the Chief Justice amending the Information, the Application is equally obvious, direct, and necessary; for what Chief Justice can make Amendments in Criminal Prosecutions before trials in which the Crown is concerned, but the Chief Justice of the King's Bench?

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If the words "Lord Mansfield," had been printed in Capital Letters, it would not have pointed him out more visibly to the Public, than the words "Chief Justice," applied to the Amendment of an Information; and where, from the manifest context of all the Passages relating to a Chief Justice, it is evident that the Chief Justice, mentioned in the first part of the Passage, page 123, is the same Person who is carried through all the Passages, and that is, the Chief Justice in that great Court of Criminal Process, the Court of King's Bench.

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Affidavits are only necessary where the Person does not appear with clearness and certainty upon the face of the Libel; but the Affidavit of the Chief Justice himself, or of the whole Legislature put together, could not have connected the Person and the Passage together more strongly than the words themselves do: and the Affidavit made by Mr. Barlow and Mr. Hughes does not fix the Relation, or add the least additional Evidence, in respect of the Allusion, but only to shew, "ex abundanti," that there was not the least foundation for any part of the assertion.

The Affidavit only shews that it was a malignant Fiction, formed upon a Transaction which did pass before the Chief Justice, and a libellous Misrepresentation of it; and, if no such Affidavit had been made, it would have appeared, upon the face of the Paper, to have been an infamous Aspersion and Libel, unrelated to any transaction whatsoever; and there is nothing for a Jury to determine, but whether the Court of King's Bench is the Court of King's Bench, and whether Lord Mansfield is the Chief Justice in it.

But suppose there were Facts upon which a Jury might exercise their Judgment; is it not half the Business of this Court to examine

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and try those Facts upon Applications for Attachments? And though I wish as well, and have as high an opinion of Trials by Jury, as any man has or ever had; and where Facts are doubtful, this Court often directs Issues to ascertain them; yet Attachments are only Procefs to bring Parties into Court; and where Facts are clear, plain, and as manifest as Words can make them, to what end, intent, and purpose, are we to desire any further Information or Satisfaction about them?

I think no Affidavit is necessary to connect the Passages either with the Court or the Chief Justice, but that the Relation is self-evident, and appears to a demonstration upon the face of the Pamphlet.

The third and last Objection is, that, supposing this Pamphlet to contain Passages libelling the Court or the Chief Justice, yet that it is not proper for this Court to proceed against the Delinquent by way of Attachment, but that it should leave him to be prosecuted by Indictment or Information.

There are two Points to be considered under this Objection.

The first respects the Passages affecting the Court, and the Chief Justice acting in Court: The other respects the Passage reflecting upon the Chief Justice for the Amendment made out of Court.

I will first consider what has been said with respect to Attachments in general, and the distinction made between the propriety of applying them to one species of Contempt and not to another; because that part of the Argument goes to all the Passages in the Pamphlet, whether they reflect upon the Judges for what they do in the Court, or in their Judicial Capacity out of it.

I will then consider the other Point about the Amendment made by the Chief Justice out of Court.

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It has been argued, that the mode of Proceeding by Attachment is an Invasion upon the ancient simplicity of the Law ; that it took its rise from the Statute of Westminster, Ch. 2 ; and Gilbert's History of the Practice of the Court of Common Pleas, p. 20, in the first Edition, is cited to prove that Position. And it is said, that Act only applies to Persons resisting Process ; and though this mode of Proceeding is very proper to remove Obstructions to the Execution of Process, or to any contumelious Treatment of it, or to any Contempt to the Authority of the Court ; yet that Papers reflecting merely upon the Qualities of Judges themselves, are not the proper objects of an Attachment ; that Judges have proper Remedies to recover a Satisfaction for such Reflections by Actions of "Scandalum Magnatum ;" and, that in the Case of a Peer, the House of Lords may be applied to for a Breach of Privilege ; that such Libellers may be brought to punishment by Indictment or Information ; that there are but few Instances of this sort upon Libels on Courts or Judges ; that the Common Pleas lately refused to do it ; that Libels of this kind have been prosecuted by Actions and Indictments ; and that Attachments ought not to be extended to Libels of this nature ; because Judges would be determining in their own Cause ; and that it is more proper for a Jury to determine "quo animo" such Libels were published.

As to the origin of Attachments, I think they did not take their Rise from the Statute of Westminster, Ch. 2 ; the Passage out of Gilbert does not prove it ; but he only says, "the original of Commitments for Contempt "seems" to be derived from this Statute ;" but read the Paragraph through, and the end contradicts the "seeming" mentioned in the beginning of it, and shews that it was a part of the
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Law of the Land to commit for Contempt, confirmed by this Statute; and indeed, when that Act of Parliament is read, it is impossible to draw the commencement of such a Proceeding out of it: it impowers the Sheriff to imprison Persons resisting Process; but has no more to do with giving Courts of Justice a Power to vindicate their own Dignity, than any other Chapter in that Act of Parliament.

The Power, which the Courts in Westminster Hall have of vindicating their own Authority, is coeval with their first Foundation and Institution; it is a necessary Incident to every Court of Justice, whether of Record or not, to fine and imprison for a Contempt to the Court, acted in the face of it, 1 Vent. 1. And the issuing of Attachments by the Supreme Courts of Justice in Westminster Hall, for Contempts out of Court, stands upon the same immemorial Usage as supports the whole Fabrick of the Common Law; it is as much the "*Lex Terræ*," and within the exception of Magna Charta, as the issuing any other Legal Process whatsoever.

I have examined very carefully to see if I could find out any vestiges or traces of its Introduction, but can find none. It is as ancient as any other part of the Common Law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the Common Law, but to act in an alliance and friendly conjunction with every other Provision which the wisdom of our Ancestors has established for the general good of Society. And though I do not mean to compare and contrast Attachments with Trials by Jury, yet Truth compels me to say, that the mode of proceeding by Attachment stands upon the very same foundation and basis as Trials by Jury do,—immemorial Usage and Practice; it is a Constitutional
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Remedy in particular Cases, and the Judges, in those Cases, are as much bound to give an activity to this part of the Law as to any other part of it. Indeed it is admitted that Attachments are very properly granted for resistance of Process, or a contumelious treatment of it, or any violence or abuse of the Ministers, or others, employed to execute it. But it is said that the course of Justice in those Cases is obstructed, and the Obstruction must be instantly removed; that there is no such necessity in the case of Libels upon Courts or Judges, which may wait for the ordinary method of Prosecution without any inconvenience whatsoever. But when the nature of the Offence of libelling Judges for what they do in their Judicial Capacities, either in Court or out of Court, comes to be considered, it does, in my Opinion, become more proper for an Attachment than any other Case whatsoever.

By our Constitution, the King is the Fountain of every Species of Justice, which is administered in this Kingdom. 12 Co. 25. The King is “de jure” to distribute Justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his Power to his Judges, who have the custody and guard of the King’s Oath, and sit in the Seat of the King “concerning his Justice.”

The Arraignment of the Justice of the Judges, is arraiging the King’s Justice; it is an Impeachment of his wisdom and goodness in the choice of his Judges, and excites in the Minds of the People a general Dissatisfaction with all Judicial Determinations, and indisposes their minds to obey them; and whenever men’s Allegiance to the Laws is so fundamentally shaken, it is the most fatal and most dangerous Obstruction of Justice, and, in my Opinion, calls out for a more rapid and immediate Redress than any other Obstruction
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whatsoever; not for the sake of the Judges, as private Individuals, but because they are the Channels by which the King's Justice is conveyed to the People. To be impartial, and to be universally thought so, are both absolutely necessary for the giving Justice that free, open, and uninterrupted current, which it has, for many ages, found all over this Kingdom, and which so eminently distinguishes and exalts it above all Nations upon the Earth.

In the moral Estimation of the Offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the Rules of the Court, for which Attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant Scandal which fancy could suggest upon the Judges themselves. It seems to be material to fix the ideas of the words, "Authority" and "Contempt of the Court," to speak with precision upon the Question.

By the word "Court," I mean the Judges who constitute it, and who are intrusted by the Constitution with a portion of Jurisdiction defined and marked out by the Common Law, or Acts of Parliament. "Contempt of the Court" involves two Ideas: Contempt of their Power, and Contempt of their Authority. The word "Authority" is frequently used to express both the right of declaring the Law, which is properly called Jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word Power: but by the word "Authority," I do not mean that coercive Power of the Judges, but the Deference and Respect which is paid to them and their Acts, from an Opinion of their Justice and Integrity.

Livy uses it according to my idea of the word, in his character of Evander:—" *Authoritate magis quam Imperio pollebat:*" it is not
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“ Imperium ;” it is not the coercive Power of the Court ; but it is Homage and Obedience rendered to the Court, from the Opinion of the qualities of the Judges who compose it : It is a confidence in their Wisdom and Integrity, that the Power they have is applied to the Purpose for which it was deposited in their hands ; that Authority acts as the great auxiliary of their Power, and for that reason the Constitution gives them this compendious mode of Proceeding against all who shall endeavour to impair and abate it ; and therefore every instance of an Attachment for contumelious words, spoken of a Rule of the Court (of which there are great many) is a Case in point to warrant an Attachment in the present Case, where a Rule of Court is the object of the defamation ; and it would be a very strange thing that Judges, acting in the King’s Supreme Court of Justice in Westminster Hall, should not be under the same protection as a Bailiff’s Follower, executing the Process which those Judges issue : it is not their own Cause, but the Cause of the Public, which they are vindicating, at the instance of the Public ; for I do not think that Courts of Justice are to take their Complaints up of themselves : it must be left to His Majesty, who sustains the person of the Public, to determine whether the Offence merits a public notice and animadversion ; and in this state of the Proceedings, they are only putting the Complaint into a mode of Trial, where the Party’s own Oath will acquit him ; and in that respect it is certainly a more favourable Trial than any other : for he cannot be convicted if he is innocent, which, by false Evidence, he may be by a Jury ; and if he cannot acquit himself, he is but just in the same situation as he would be in, if he was convicted upon an Indictment or an Information ; for the Court must set the Punishment in one Case as well as the other :

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they do not try him in either Case; he tries himself in one Case, and the Jury try him in the other.

An Action of "Scandalum Magnatum" is only to redress the private Injury: Compensation, and not Punishment, is the object of it; and though some Judges may have sought pecuniary Satisfaction, yet others have thought more liberally, and disregarded all private emolument or gratification for the personal Injury, and resented the Indignity as the Cause of the Public; and the Conduct of the Court of Common Pleas, in respect of the Libel published by the Court Martial, is an Authority in point upon this part of the Case.

As to proceeding in the House of Lords for a Breach of Privilege, the Scandal upon the Noble Lord does not affect him in the character of a Peer, but as the Chief Justice of this Court; and if it did, I cannot think it a more favourable mode of Prosecution than an Attachment, where his own Oath will acquit him. As to leaving such Libels to be prosecuted by Indictment or Information, that Juries may judge, "quo animo," they were written or published; I am as great a friend to Trials of Facts by a Jury, and would step as far to support them as any Judge who ever did, or now does, sit in Westminster Hall; but if to deter men from offering any Indignities to Courts of Justice, and to preserve their Lustre and Dignity, it is a part of the legal System of Justice in this Kingdom, that the Court should call upon the Delinquents to answer for such Indignities, in a summary manner, by Attachment, we are as much bound to execute this part of the System as any other; for we must take the whole System together, and consider all the several parts as supporting one another, and as acting in combination together, to attain the only end and object of all Laws, the safety and security of the People.

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The Trial by Jury is one part of that System; the punishing Contempts of the Court by Attachment is another; we must not confound the modes of Proceeding, and try Contempts by Juries, and Murders by Attachment. We must give that energy to each, which the Constitution prescribes. In many Cases, we may not see the correspondence and dependance which one part of the System has and bears to another; but we must pay that deference to the Wisdom of many ages as to presume it; and I am sure it wants no great intuition to see, that Trials by Juries will be buried in the same grave with the Authority of the Courts who are to preside over them.

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The Constitution has provided very apt and proper Remedies for correcting and rectifying the involuntary mistakes of Judges, and for punishing and removing them for any voluntary perversions of Justice. But if their Authority is to be trampled upon by Pamphleteers and News-writers, and the People are to be told that the Power, given to the Judges for their Protection, is prostituted to their Destruction, the Court may retain its Power some little time, but I am sure it will instantly lose all its Authority; and the Power of the Court will not long survive the Authority of it: Is it possible to stab that Authority more fatally than by charging the Court, and more particularly the Chief Justice, with having introduced a Rule to subvert the Constitutional Liberty of the People? a greater Scandal could not be published.

A Rule was first made in Hilary Term, 1757, in the Case of the King and Charles Thacker, and was calculated entirely to meet the Case of persons pressed under the 29 Geo. II. c. 4.

It had been doubted, (not by the Court,) upon former Press Acts, whether the Judgment of the Commissioners, as to the fitness of the

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men impressed, was not intended by the Legislature to be final; but as it was an Authority only in the Commissioners, Complaints were made of their exceeding and abusing it, and Writs of Habeas Corpus granted; but the Facts, stated in the Return of these Writs, being only controvertible in an action for a false Return, according to the Opinion of the House of Lords in the year 1759, great delay must have arisen in Cases which required immediate dispatch; and in case no Return was made by the Officer, but that he had the Party in his Custody, and had him ready in Court, according to the command of the Writ (and as he was a stranger to the propriety of the Press, he could scarcely make any other,) all the Pressed men in the Army must have been discharged, to the manifest hazard of the Nation, who had been under a necessity of having recourse to that Expedient for recruiting the Army; but still, in that Case, or if the Man had not been in actual Custody, but at large, and had left the Army without a military Dismission, it must have been, in both Cases, at the peril of his being afterwards tried and punished as a Deserter, in Case he was a proper object of the Press; and therefore, to give a full, complete, and adequate Relief to the Party pressed, and to give the Act of Parliament that Operation which the Legislature intended, and which that Supreme Law, the safety of the People, required, and which must have been endangered by discharging all the pressed men, (because the persons, who made the Returns, were, and from the nature of the Case, must have been, strangers to the Facts which did or did not make them objects of the Press,) the Court, in Hilary Term, 1757, first made a Rule upon the Commissioners under the Act of Parliament, as having exceeded their Authority, to shew Cause why the Party should not be discharged out of the Custody of Mr. Hayward.

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the Keeper of the Savoy, where Thacker was confined; and that Hayward should not suffer him to be taken or sent away, until the Court should further determine therein, and that Notice of that Rule should be given to the Solicitor of His Majesty Treasury in the mean time. By this Rule, the Question of the Fitness of the Man, viz. whether he was an object of the Act or not, was brought before the Court much more expeditiously than it could have been done by an Habeas Corpus, where the Facts of the Return could not be controverted by Affidavits. He was secured, by the provision in the Rule, from being taken or sent away in the mean time; and by making the Crown and the Commissioners Parties to the Rule, the Question received such a complete Determination, as delivered the Party absolutely from the condition of a Soldier, in case it was determined for him; and if it was determined against him, he might still have recourse to an Habeas Corpus, and take the sense of a Jury upon the Facts which should be contained in the Return to that Writ; and no Habeas Corpus was ever denied to any body who prayed it upon a proper foundation. This Rule was offered to the People as a more beneficial remedy, but was not imposed upon them in the place of the Habeas Corpus. The manifest and apparent utility of it, made it the option of the Bar in many subsequent Cases, in preference to the Writ of Habeas Corpus.

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I was not in Court that Term the Rule was made, but I was informed of it, and most cordially approved of it. I mention the circumstance of my not being here at that time for two Reasons: 1st. To express my sorrow that I had not a share in the Formation of it. 2dly. To avoid any imputation of applauding myself in what I am going to say about it.

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In more temperate Times, this Rule would have been treated as a Heaven-directed Thought for the better supporting the Liberty of the People, in the execution of an Act of Parliament, which breaks in upon that Equality which the Law most anxiously affects to establish for all who live under this Government, and which nothing but the necessities of the State can ever reconcile to the Genius of a Free Constitution. It was the best expedient which the most consummate prudence, and the warmest wish for the happiness of the People, could have invented, to give the State all the benefit which the Legislature really meant they should receive from that Law; and at the same time to guard Individuals against any abuse of it; and in times to come, it will be one great memorial of the zeal and affection of the Judges who made it, for the Liberties of the People.

It was said, that this Pamphlet was an answer to a libellous Pamphlet on another Court: I never read any Pamphlets, and therefore do not know what that Pamphlet was; but as to litigated Questions between the two Courts, on the Habeas Corpus Act, I know of none; and a Libel upon one Court of Justice, is a very odd way of answering a Libel upon another: I should rather think that both the Pamphlets came out of the same Quiver; I am sure the same malignant Spirit, the same evil Genius of this nation, guides the hand of the persons who calumniate any Court of Justice: and as to the Court of Common Pleas not taking up a Complaint of this kind, what was the nature of that Complaint? If properly proved, or how it came before them, is not stated: but I am fully persuaded, from my knowledge of their Wisdom and Justice, that if such a Complaint as this had been laid before them, they would have acted as we do upon it.

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If an Attachment is a Constitutional mode of Proceeding for Libels upon Courts of Justice, they must be competent to the Question of "Quo animo" they are published; and especially in this stage of the Proceeding, which is only to bring the Party into Court to tell his own Story. It is the Intention which, in all Cases, constitutes the Offence. "*Actus non facit reum, nisi mens sit rea.*" It would be a contradiction in terms to admit Courts to have a Cognizance of the Offence, and yet not admit them to be Judges of the only ingredient which makes it so.

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As to the Passages relating to the Amendment made by the Chief Justice out of Court, there is no necessity of giving any Opinion upon that part of the Case, as the Attachment ought to go for the other passages reflecting upon the Court and the Chief Justice, for acts charged upon him as done in Court; but as that Point has been argued very elaborately, I will give my opinion upon it. The Legality of this Amendment was never controverted: it could not be controverted: it was founded upon Precedents, and upon that immutable principle of all Practice, the bringing the real merits of the Case in question before the Court: the whole doctrine of Amendments turns upon that principle.

The Objection to granting the Attachment upon this Passage is, that it respects the Chief Justice only, and neither reflects upon the Court, nor the Process of the Court; that Orders made by Judges at their Chambers cannot be enforced by Attachment, till they are made Orders of the Court; and that the disobedience must be subsequent to their being made Orders of the Court; and a doubt has been rather hinted at than made, as to the legality of Orders made
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by Judges at their Houses or Chambers. And the Passage, in 2 Inst. 103. was mentioned as condemning this Practice.

When the Practice first began I cannot find out; my Search and Inquiries have been as fruitless and ineffectual in that respect as Mr. Dunning's. Popham, 180.—One hundred and forty years ago, an Order was made by two Judges in Vacation, to stay a Judgment:—a very extraordinary interposition, but no complaint of it as illegal. But whenever it began, it stands upon too firm a basis to be now shaken;—constant immemorial Usage, sanctified and recognised by the Courts of Westminster Hall, and in many instances by the Legislature; and it is now become as much a part of the Law of the Land, as any other course of Practice which Custom has introduced and established: but though difficult to find out when it was introduced, yet it is very easy to see why it was introduced—for the ease and convenience of the Suitors of the Court;—to accommodate them at a much easier expence, and with less trouble, in a great variety of Cases, and especially in Vacation-time, when they could not have access to the Court; and when there was a great multiplicity of business, the saving of the time of the Court in adjusting trifling matters, which might be so much better employed in momentous ones, was no inconsiderable motive towards establishing it. And still, it is the business of the Court, which is done at Chambers; that is, it is business which must be done in Court, if it could not be done at Chambers.

And the Passage in Lord Coke, 2 Inst. 103. when duly considered, relates only to Rules, Orders, Awards, and Judgments, made at Chambers, “ex parte;” where a man may lose his Cause, or receive great prejudice or delay, in his absence, for want of Defence; and
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the Passage, cited by him out of Seneca, very fully explains Lord Coke's meaning to relate to Orders or Rules, "*parte alterâ inauditâ*:" whereas, Judges never make Orders in Chambers, without hearing both Parties, or giving them an opportunity of being heard. And there is nothing in the Constitution of the Court, which forbids the business of it being done by one Judge; for one Judge, sitting in Court, has the Authority of the whole Court; and a Libel upon him, would be a Libel upon the Court in the strictest sense of the word; and certainly a Libel upon a single Judge, for an Opinion given in Court, controuled by the other three Judges, although it could never be called a Libel upon the Court, yet would be a Contempt of the Court, and be proper for an Attachment; and therefore the Question resolves itself at last into this single Point, Whether a Judge, making an Order at his House or Chambers, is not acting in his Judicial Capacity as a Judge of this Court, and both his Person and Character under the same Protection, as if he was sitting by himself in Court? It is conceded that an Act of violence upon his Person, when he was making such an Order, would be a Contempt punishable by Attachment; upon what principle? for striking a Judge in walking along the Streets, would not be a Contempt of the Court. The reason therefore must be, that he is in the exercise of his Office, and discharging the function of a Judge of this Court; and if his Person is under this Protection, why should not his Character be under the same Protection? It is not for the sake of the Individual, but for the sake of the Public, that his Person is under such Protection; and in respect of the Public, the imputing Corruption and the perversion of Justice to him, in an Order made by him at his Chambers, is attended with much more mis-

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chievous consequences than a Blow; and therefore the reason of Proceeding in this summary manner, applies with equal, if not superior, force, to one Case as well as the other; there is no greater obstruction to the execution of Justice from the striking a Judge, than from the abusing him, because his Order lies open to be enforced or discharged, whether the Judge is struck or abused for making it.

The greatest Objection upon this part of the Case has been, that this Court will not enforce obedience to a Judge's Order, by an Attachment, before it is made a Rule of Court; and that the Refusal to perform it must be subsequent to its being made a Rule of Court; and from thence it has been inferred, that it can be no Contempt of the Court to libel a Judge for making an Order, because it would be no Contempt of the Court to disobey it. But, upon Consideration, I think the inference is not a just one.

The Right of the Court to controul these Orders is to preserve a uniformity of Practice, and to prevent any clashing which might arise from four distinct and separate Exertions of the same Jurisdiction. The refusing to issue an Attachment for the Breach of such an Order, before it is made an Order of the Court, was founded upon the same Principle: We will not enforce Obedience to it till we have adopted it; but that Provision only respects the effect of the Order when made, and does not the least apply to the Capacity or Character in which the Judge makes it. He is still opening and exercising the Jurisdiction of the Court, and is doing the Business which must otherwise be done in Court, exactly in the same manner as we do at the Side Bar; and surely a Libel upon the Judges for what they do at the Side Bar, within a few yards of the Court, would be as much the object of an Attachment as for any thing done in Court.

Court. Custom legitimates the Practice at Chambers, as much as at the Side Bar; and Custom may qualify and modify the Acts they do in both places.

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But still they are emanations of Judicial Power, and whether they have more or less weight, they are Acts done by the Judge in the same Capacity and Character in which he sits here; and whether he is swearing an Affidavit out of Court, or pronouncing a solemn Opinion in Court, the Reason of resenting the Indignity is the same, and “ubi eadem est ratio, ibi idem est jus.”

It may perhaps merit a less Punishment to libel a single Judge in Court or out of Court, than to libel the whole Court; but the Quantum of the Offence does not vary the mode of prosecuting it; it is an Offence “eiusdem generis” although “inferioris gradus.” And I cannot explore a single reason which can be urged to cover the Judges in Court against Calumny and Detraction for what they do there, which does not hold equally true, though in a less degree, when applied to what they do in their Judicial Capacities out of Court: The Quantum of the offence is different, but the Quality of the Offence is the same.

Suppose the Pamphlet had charged all the Judges with Corruption in making four Orders in different Causes, it would have been a greater offence than charging one; but if it is not a proper mode of Proceeding in the Case of a single Judge, it would not be proper in the Case of the Four; for though the Libel would, in that Case, take in the whole Court, yet if the Reason which is urged, of the inefficacy of their Orders till made Rules of Court, is sufficient to take them out of the Protection of the Court in the Case of one Judge, it must hold in the Case I mention; for each Order may afterwards be con-

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trouled by the other Judges, when they come to sit collectively together as a Court.—See the consequence : If a Bailiff's Follower, at the time of executing a Process to arrest a man, should be called a Rogue and abused, the Court is to grant an Attachment ; but if the Four Persons whom the King appointed to execute one of the noblest branches of his Regal Function, which the Usage says may be done out of Court as well as in it, are represented to the People as acting in their Judicial Capacities out of Court corruptly, illegally, or oppressively, they are not to be under the same Protection as a Bailiff's Follower ; but the Chief Justices and Judges of this Court must wait at the Door of the Grand Jury Chamber, with their Indictments in their Hands, and afterwards attend the Trial, which must still be before one of themselves, in order to get at that Justice which the meanest person in the Kingdom, acting under their Authority, has a right to, in the first instance, by an Attachment.

If the Practice of making Orders at Chambers is a legal one, the Protection must and ought to follow it. If the People are told that the Judges act unjustly and impiously at Chambers, can they think that they act otherwise when they sit here ? Does not the Scandal follow them into this Court, and mark them out as objects for the finger of Scorn to point at ? Would it not, must it not, necessarily bring this Court into Contempt, to say, the Judges at their Chambers make Orders or Rules corruptly ? The difference between the force, the weight, and the energy of an Order and of a Rule, respects only the mode of executing them ; but the imputing Corruption to the Judges who made either, equally murders their Fame, which is the vital part of their Authority when they sit here ; and really in every shape which this Question presents itself to my understanding, I can make

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no difference between a Judge acting in Court, or Judicially out of it, but that he has not the same plenitude of Power in the one case which he has in the other. But still he acts by virtue of the Patent constituting him a Judge of this Court, and of the Power which the Law gives him in that Character and Capacity. When he issues his Warrant as a Conservator of the Peace, the Court punishes the Officer; who disobeys it, by Attachment: Why?—Because it is the act of a Judge in his Judicial Capacity; indeed it is an Obstruction to Process in that particular Complaint. But suppose he was calumniated for issuing such a Warrant, would not the Court grant an Attachment for it?

The Court of Chancery has always punished the abuse of their Masters, or of Commissioners of Bankrupt, whilst acting in the execution of their Offices, in this summary manner, by Attachment; and I should think a Libel upon them, or upon the Master of the Crown Office, or on the Civil side, for acts done by them in their Official Capacities, would be within the reach and reason of this mode of Proceeding. It is the Business of the Court, transacted by their Officers; and though under the Controul of the Court, that only respects the Effects of what they do, and not the Capacity in which they do it.

Perhaps it may be said; though Attachments are granted for the abuse of Officers in the actual Service of Process, yet never for a Libel upon them for what they have done in that Capacity; and therefore no Argument can be drawn from the Practice of issuing Attachments in favour of Bailiffs abused in actual Service, any further than whilst a Judge is in the actual Execution of his Office: but the Principles upon which the Court proceeds, in granting Attachments.

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ments for abusing Bailiffs in the execution of Process, and abusing Courts for their Judgments, must be attended to, in order to find out the difference between the Case of libelling a Bailiff, and libelling a Judge of the Court.

The Principle upon which Attachments are granted, in respect of Bailiffs, is to facilitate the Execution of the Law, by giving a summary and immediate Redress and Protection to the Persons who undertake it. The Law considers it as a Contempt of the Authority of the Court, to abuse and vilify the Person who is acting under it.

But the Principle upon which Attachments issue for Libels upon Courts, is of a more enlarged and important nature,—it is to keep a blaze of Glory around them, and to deter people from attempting to render them contemptible in the eyes of the Public.

Bailiffs are neither appointed by the King nor the Court; a Libel upon them terminates only in the Defamation of a private Individual: it is only telling the People, that a person employed to execute Process has abused his Authority. But a Libel upon a Court is a Reflection upon the King, and telling the People that the Administration of Justice is in weak or corrupt hands; that the Fountain of Justice itself is tainted, and, consequently, that Judgments, which stream out of that Fountain, must be impure and contaminated.

The Authority of the Court is contemned by abusing a Bailiff in the actual Service of Process: but the Justice of the Court is not arraigned, nor is the Court rendered contemptible in the eyes of the People by imputing misbehaviour to him; and therefore an Attachment for a Libel upon a Judge for what he does at Chambers, does not proceed upon any Principle analogous to the Case of a Libel upon a Bailiff, but falls directly within the Principle of libelling the Court,

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Court, which is imputing to the King a Breach of that Oath, which he takes at the Coronation, to "administer Justice to his people;" and a Judge, at his Chambers, is as much in the Administration of that Justice, as when he is in Court, though his Acts have not the same efficacy as the Acts of the whole Court; and Orders for Amendments do in some respects differ materially from Mandatory Orders, enjoining a third person to pay money or perform any particular act; for Obedience cannot be enforced to such Mandatory Orders, till the Court has expressly recognized them; but Orders for Amendments require no Act of the Court to authenticate them. When the Alteration is made in pursuance of such an Order, and there is no Application to discharge such an Order, but it is acquiesced in by all Parties, it becomes the Act of the whole Court; and the Part amended is as much a part of the Record of the Court as any other part of it; and when this Pamphlet was printed, the Record had been amended in pursuance of the Order made by the Chief Justice; and therefore to every intent and purpose the Amendment had been adopted, recognized, and was become the Act of the Court, by the acquiescence of the Parties, as emphatically and effectually, as if it had been originally ordered by the Court.

(b) Vide note (a) p. 243. also the Case of Rex v. John Wilkes, Esquire, Hil. Term. 10 Geo. III. 4 Bur. p. 2527. where the subject of Amendments, made out of Court, is fully discussed.

IN THE COMMON PLEAS.

ROE, on the Demise of GEORGE DODSON, Esq;

AGAINST

GREW and Others.—In Ejectment.

Hil. 7 Geo.
III. 1767.
s. Willon,
322.

Dodson
against
Grew and
Others.

THIS was a Case on an Ejectment for the Recovery of certain Lands in the County of Middlesex, which was tried before Lord CAMDEN at the Sittings after last Easter Term, whereby it appeared—

That DANIEL DODSON was seised in Fee of the Premises in question, and devised them in these Words; viz.

“ Item. I give, devise, and bequeath unto my Nephew, GEORGE
 “ GREW, All that my Mansion-house or Dwelling, with the Out-
 “ houses, Stables, Buildings, Orchards, Gardens, and Lands there-
 “ to belonging, situate and being at Waltham Cross, in the said
 “ County of Hertford, now in my own Possession, and used there-
 “ with: And also all those my Meadow lands in Fowley, in the
 “ Parish of Cheshunt, in the said County of Hertford, also in my
 “ own Possession: And also all that my one close of Pasture land; in
 “ Waltham Cross aforesaid, now in the Possession of William Hunt:
 “ And also all those my three acres of common Field Land, lying and
 “ being in Brickwall field, Swan field, and Whitehorse field, in
 “ Waltham Cross aforesaid, now in the possession of myself and the
 “ said William Hunt: And also all those my three acres of land,
 “ lying

“ lying and being in Bellinore Lane, in the Parish of Enfield, and
 “ County of Middlesex; and all other my lands, tenements, and
 “ hereditaments in Enfield aforesaid: And also all those my Cham-
 “ bers in Lincoln’s Inn, No. 5, now in my own Possession, in the
 “ said County of Middlesex:—To HOLD all and every the aforesaid
 “ Messuage, Lands, Tenements, Hereditaments, Chambers, and
 “ Premises, with their and every of their Appurtenances, unto him
 “ the said GEORGE GREW for and during the term of his natural
 “ life; and from and after his decease, to the use of the issue male of
 “ his body lawfully to be begotten, and the heirs male of the body of
 “ such issue male; and for want of such issue male, then I give all
 “ and every the aforesaid Premises unto my nephew George Dodson,
 “ his heirs and assigns for ever.”

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THAT in the Devise to GEORGE GREW, the words “ heirs male of
 “ his body” were originally written, but that the word “ heirs” was
 scratched out, and the word “ issue” inserted in its stead, in the same
 hand with the body of the Will, but in different ink.

THAT GEORGE DODSON, the Devisee in remainder in the said
 Will, was GEORGE DODSON, the Lessor of the Plaintiff.

THAT the Testator devised other Estates to the said Lessor of the
 Plaintiff in fee.

THAT GEORGE GREW, and the Lessor of the Plaintiff, were the
 Testator’s Nephews; and that he devised the residue of his Estates,
 both real and personal, equally between his said two Nephews.

THAT GEORGE GREW had no child at the time of making the
 Will: that he entered on the Premises, suffered a Recovery thereof,
 and died without issue male.

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On this Case a Verdict was given for the Plaintiff, subject to the Opinion of the Court upon this Question, viz.

WHETHER GEORGE GREW took an Estate Tail, or for Life only, under the said Will?

Lord Chief Justice WILMOT.

I think this is an Estate Tail. The general Rule is a clear and a just one, that the Intention of the Testator is to be collected from the whole Will, and such a Construction made as will effectuate that Intention, provided that intention does not contradict, or clash with, any legal principles or positive Rules of Law : for though the Statute of Wills gives a power to Parties to devise at their will and pleasure, yet that will and pleasure are bounded and circumscribed, and must not pass the Line which the Law has laid down for the modification of real Property upon principles of general Utility : they cannot create Perpetuities ; they cannot lock up Property for a longer time than a Life or Lives in being, and twenty-one years afterwards, in the Case of Infants ; they cannot give a Fee, and say it shall descend to all the Sons, or to Daughters exclusive of Sons ; they cannot restrain a Tenant-in-Tail from suffering a common Recovery ; and therefore in these, and all similar Cases, the Law, which is the Will of the whole Community, must controul the Will of Individuals. But this Case is not affected by any Intention crossing the Law, for it is equally lawful to give the one Estate as the other ; the word Issue has no fixed technical meaning annexed to it ; and the only true Question in this Case is, What was the Intention of the

Testator, and whether that may be best effectuated by giving an Estate for Life or in Tail?

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It is stated in the Case, that GEORGE GREW died without Issue male; but that event will not vary the Construction of the Will, which must be considered exactly in the same manner as if he had, or might have had, many Sons; and looking at the Devise, in that view, of there being many Sons, will have a most powerful Influence upon the Exposition of it, when the Intention comes to be nicely and critically examined: for though the Testator certainly intended, in the first instance, to give GEORGE GREW only an Estate for Life; yet if he, as certainly, intended that all his Sons should take in succession one after another, and they cannot take in that manner but by lodging the Estate Tail in GEORGE GREW, then it comes to this Case: here are two things intended, one an Estate for Life to G. GREW, another an Estate in succession to all his Sons in Tail male “ad infinitum:” Can they both take place? If they can, they ought; if they cannot, then balance the two Intentions against one another, and see which is the weightiest and most comprehensive, and give that an effect. Courts substitute themselves in the place of a Testator; and suppose the Question to have been asked him—“You have willed “two things, which cannot both be obeyed exactly according to your “Will, and therefore one must yield to the other:” What must have been the Answer? “I wish to be obliged in the principal, capital, and “most material destination I have made, and to reject the secondary “and subordinate one.”

There are three points to be considered:

1st.—If he intended a successive Inheritance to all the Issue male of GEORGE GREW, “ad infinitum,” in preference to G. DODSON?

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2dly.—Whe-

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2dly.—Whether that Intention can take place, if **GEORGE GREW** has only an Estate for Life?

3dly.—If it cannot, then which of the two Intentions must govern the Construction? That is, if the words “for life” must give place, or the words expressing an Intention of giving “a successive Inheritance” to the Issue male of **G. GREW**?

As to the 1st. Point.—The Will is clear: Testator had two Nephews, **G. GREW** and **G. DODSON**; he gave particular Estates to each; this Estate he gave in Settlement;—others to **DODSON** in Fee;—the residue of his real and personal Estate equally between them. They were both equally objects of his favour and bounty, except that he gave **GREW**’s Estate with Remainder to **DODSON**; his Name possibly produced that difference in the limitations; but it was not to take place whilst any Issue male of **G. GREW** existed; a general failure of that Line is to open the Succession to **DODSON**, and therefore a construction to let him in sooner would directly encounter the manifest Intention of the Testator, who was making each of his Nephews the distinct Root of succession to particular parts of his Estate.

It was objected, that the word is only descriptive of an Individual, and the words “of the body of such issue male” are in the singular number. Issue, in its natural, ordinary signification, means “all;” it may be restrained. If first, next, or any other similar words had been used, he might have confined its general meaning; but as it stands in the Will, it comprehends “all.” The word “Body” in the singular number, was not meant to point out one Individual, viz. the first Issue, and to exclude all the rest; but to limit the operation of the Devise to one at a time in a course of succession, and to exclude the Issue from taking all together, which might have been more doubtful,

ful, if the word had been in the plural number, "Bodies:" but without express words, the Court will not make an exposition productive of such absurd consequences. If only one son, it must be the first; the existence of a son for a moment determines the limitation; and if ten more sons had been born after, they cannot take, but the Remainder limited to G. DODSON is to fall into possession, in direct opposition to the Will, which says it shall take place for want of "such Issue male"—*such*; What? Issue male of the body of G. GREW; comprising and embracing every branch arising from him; not one, but all the male Line derived from him.

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It was also objected, that "Issue" is more properly a word of Purchase.—It is used in the "Statute de Donis" without an idea of Purchase annexed to it, and it acts in a double capacity, as will best answer the Intention; and though it was substituted in the place of the word "heirs," which was scratched out; and it was fairly argued he might intend it as a word of Purchase, yet it does not carry the Argument a jot further than the words "for life" do; for if they take by Purchase, they must all take as Joint Tenants for Life and Tenants in Common of Inheritance: Could that be his Intention? For if he had ten sons and nine leave Issue, the tenth must have the whole Estate by Survivorship; and when all are dead, then the Estate must break into ten parts, and there can be no Cross-Remainders; so that when there was a failure of Issue of one son, that part must go over to DODSON, when no part was intended to him whilst there was any Issue male of the body of G. GREW.—He intended all to take, but in a course of succession.

2dly.—Can this Intention take place, if G. GREW takes only an Estate for Life?

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It may, by construing the word "Issue" to mean, first and every other Son in Succession. Suppose he had said, I mean by Issue, first and every other Son, it must have been so expounded, because words are only pictures of ideas upon paper; and therefore if he puts a meaning on the word himself, it must be understood as he meant it: But he has not said so, and therefore he leaves the word to act in its own natural character, and in that shape it will not endure to be expounded, "first and every other son in succession;" for, "ex vi termini," it means "all," and hath not an eye of successive priority in it; and there is no Case where it ever was construed to mean first and every other Son in Succession, and to create a series of contingent Remainders one after another; which it must do, or the principal Intention of the Testator be disappointed; and when it is descriptive of the Estate and operates as a word of Limitation, and gives an Estate Tail, it is not the "word," but the "Law," which regulates the Descent to all the Sons successively, upon its own favourite principle of Primogeniture. It has been argued, that if we can collect from the Will that he meant first and every other Son in Succession, why not construe it so, and thereby complete every part of the Intention? Because it would be doing violence to the word "Issue," and forcing it out of its known established sense, when the meaning of the Testator may be as effectually complied with by giving it one of its natural energies, as a word of limitation: and though the Intention, collected from the Will, is to govern the Construction, yet there must be words used which are proper and fit for that purpose. It would confound the use of all language, and introduce the greatest barbarity and confusion, to make words stand for ideas in opposition to the sense which Usage has put upon them: and as a word of Li-
mitation

mitation it does not defeat the Estate for Life; for without Fine or Recovery, which is not to be presumed, an Estate Tail is only an Estate for Life.

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As to whether the words, "heirs male of the body of A." operating as words of Purchase, will have the same effect, and take in all the Issue male of A. as effectually as if they operated as words of Limitation; I do admit, upon the authority of Co. Lit. and the Case of Southcote and Stowell, 1 Mod. 226, 237, and Freeman's Reports, 216, 225, that when the Estate once vests in an heir male of the body of A. by Purchase, that any other heir male of the body of A. may take by Descent; and the reason seems to be, because it is "quasi" an Estate Tail from A; and the Will of the Donor gives it a descendible quality, after it is once vested, as to all the lineal male descendants from A. as well as to all the lineal male descendants of the first Purchaser.

But still it will not have the same consequence as if they acted as words of limitation; for suppose A. has a son who dies in his father's lifetime leaving daughters, and A. has other sons, they can never take at all, for the second brother cannot take because he is not complete heir; whereas if it was an Estate Tail in A. it would descend upon the second son and take in all the descendants: and it is impossible to make it equivalent to a Limitation to the first and every other son, without violating and confounding the legal operation of words, and producing consequences not warranted by the Will: for upon a Limitation to the first and every other son, the Remainders all vest the instant the sons are born; and when a son is of age, he may, by a Fine, bar all his issue: but where the Limitation is "to the heir male of the body of A." no Estate vests till A. dies; and if there are

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no Trustees to preserve, &c. A. may bar the Remainders at any time after the sons are born, as well as before; and a Fine levied by his eldest son will not bar his issue if he dies before the father, because the issue will take by Purchase, and not from his father.

3dly.—Which Intention ought to take place (a) ?

If the Testator had put the Issue and Remainder-men into the power of G. GREW, it is not to be presumed he would defeat them. If he had given Contingent Remainders to the Issue, and they were to take by Purchase, he might defeat the Issue before they were born.—If Estate Tail, a chance—If confined to one Issue only, the rest had no chance;—better to have a chance of something—the Remainder was of no estimation after Estate Tail, vested or contingent, “*quâcunque viâ.*”

But suppose the Question asked, “You meant a strict Settlement with Trustees to preserve Contingent Remainders; but the words will not warrant the expounding the Will in that manner. G. GREW must either take an Estate Tail, which will let in all his Issue male, but with a power of defeating them and GEORGE DODSON; or an Estate for Life, which will let in G. DODSON, in exclusion of the sons of G. GREW?” His Answer must have been, “I do not intend G. DODSON any thing, whilst there is Issue male of GEORGE GREW.”

It was certainly the Intention of the Testator that G. GREW's Sons should take in succession, which they could not do, if he was only

(a) The latter part of this Case is rather imperfect, and seems to contain only short heads of Argument, which were probably filled up in the Delivery.

LORD CHIEF JUSTICE WILMOT.

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Tenant for Life. I am of Opinion that he was Tenant in Tail, and that Judgment must be given for the Defendant.

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The other Judges delivering their Opinions to the same effect,

JUDGMENT for the DEFENDANT.

IN THE COMMON PLEAS.

Between JOHN DRINKWATER, Esq; Plaintiff,

AGAINST

The ROYAL EXCHANGE ASSURANCE COMPANY, Defendants.

Mich. Term.
8 Geo. III.
1767.
2 Wilfon,
363.

Drinkwater
against
the Royal Ex-
change As-
surance
Company.

THIS was an Action of Covenant brought against the Defendants on a Policy of Insurance, in which the Plaintiff declared that by a certain Deed, commonly called a Policy of Insurance, made by the aforesaid ROYAL EXCHANGE ASSURANCE COMPANY, IT WAS WITNESSED, That the Capital Stock, &c. of the aforesaid Corporation should be subject and liable to pay, make good, and satisfy any Loss or Damage which should or might happen to a certain Malt Office by Fire, within the space of twelve calendar months from the day of the date of that Instrument or Policy of Insurance, not exceeding the sum of £. 500: Provided always nevertheless, and it was thereby declared to be the true intent and meaning of that Deed or Policy, that the said Stock Estate and Securities of the said Corporation should not be subject or liable to pay or make good to the Assured any Loss or Damage by Fire which should happen by any " Invasion, Foreign Enemy, or any Military or Usurped Power what-
" soever."

“foever:” Provided alfo, that that Deed or Policy ſhould not take place or be binding on the ſaid CORPORATION, if the ſaid Malt Office, at the time when any ſuch Fire ſhould happen, ſhould be in the Poſſeſſion of, or let to any perſon who ſhould uſe or exerciſe therein the Trade of a Sugar Baker, Apothecary, Chemiſt, Colourman, Diſtiller, Bread or Biſcuit Baker, Ship or Tallow Chandler, Stable-keeper or Inn-holder, or ſhould be made uſe of for the ſtowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine; but that in all or any of the ſaid Caſes the ſaid Deed, and every Clause, Article, and Thing therein contained, ſhould ceaſe, determine, be utterly void, and of none effect. And Plaintiff further ſaith, that the ſaid Malt Office in the ſaid Deed mentioned, on the twenty-eighth of September, in the ſixth year aforeſaid, was burnt, conſumed, and totally deſtroyed by Fire, which did not happen by any “Invaſion, Foreign Enemy, or any Military or Uſurped Power whatſoever;” and that the ſaid Malt Office, at the time when the ſaid Fire happened, was not in the Poſſeſſion of, or let to any Perſon who uſed or exerciſed therein the Trade of a Sugar Baker, &c.

Drinkwater
againſt
the Royal Ex-
change Af-
ſurance
Company.

To which the Defendants pleaded, 1^{ſt}, that they did not break the ſaid Covenants, nor any one of them, in manner and form as the ſaid Plaintiff hath above thereof complained againſt them, and Iſſue thereon. The Defendants, for further plea, ſay, that Plaintiff ought not to have or maintain his ſaid Action againſt them, becauſe they ſay, that whatever Loſs and Damage above ſuppoſed to have happened, by the burning and deſtroying the ſaid Malt Office by Fire, as Plaintiff hath above alleged, all ſuch Loſs and Damage was cauſed and did happen by means of an unlawful Attack and Invaſion made on the ſaid Malt Office by an Uſurped Power unlawfully exerciſed by a

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great number, that is to say, 300 persons, unlawfully, riotously, and tumultuously assembled, in breach of the peace of our Lord the King, to the terror of the Inhabitants of the City of Norwich, and that the said Fire above supposed did happen by such Usurped Power as aforesaid, and this Defendants are ready to justify; wherefore they pray Judgment whether Plaintiff ought to have or maintain his Action as aforesaid against them, &c.

Plaintiff, as to the 2d Plea above pleaded in bar, saith, that he, by reason of any thing in that Plea above alleged, ought not to be barred from having or maintaining his said Action therefore against them, because, Protesting that the said Plea, and the Matters therein mentioned, are altogether insufficient in Law to bar or preclude the Plaintiff from having or maintaining his said Action against the said ROYAL EXCHANGE ASSURANCE COMPANY; nevertheless, for Replication Plaintiff saith, that the Loss and Damage by the said Malt Office being burnt, consumed, and destroyed by Fire, in the said Declaration mentioned, did not happen by any Usurped Power whatsoever; and thereupon Issue is also joined; and on the Trial before the Right Honourable Sir JOHN EARDLEY WILMOT, Knight, Lord Chief Justice of his Majesty's Court of Common Pleas at Westminster, a Verdict was given for the Plaintiff, and £.469 Damages, subject to the Opinion of the Court of Common Pleas on the following Case; viz.

THAT the Defendants entered into the Policy as stated in the Declaration. That the Plaintiff paid the Premium, and complied with all the terms of the Policy on his part to be performed.

THAT on Saturday the 27th of September, 1766, a Mob arose in the City of Norwich, on account of the price of Provisions, and did mischief

mischiefe to one House and a Mill, by throwing about and spoiling the Flour at a Baker's House, and spoiling and damaging the Mill. That on the King's Proclamation being read, the Mob dispersed and continued quiet. That about two of the Clock in the Afternoon of Sunday, the 28th of the same September, another Mob arose on the same account, and began to pull down, and afterwards set fire to and burned down the Malthouse in question; and afterwards forcibly and riotously damaged the Houses of two Bakers, and spoiled their Furniture; that the said Mob had no offensive weapons on their going to the said Malthouse; but on their Return therefrom, ten or twelve of them had sticks in their hands, and one of them had a Spit, bent double.

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THAT, after the Mob had damaged the last of the said Bakers Houses, the Magistrates, who had not received any Notice or Information of any Mob being risen on that day until after the said Malthouse was on fire, immediately, on receiving such Notice thereof, assembled, with their Assistants, to the number of thirty, and thereupon opposed and knocked down several of the Mob, and in fifteen minutes dispersed the whole of the Mob, and the Mob never afterwards assembled any more: That the ROYAL EXCHANGE ASSURANCE COMPANY was created in the year 1720.

That the COMPANY had, at the time of the said Fire happening, made Assurances in the City of Norwich, on Houses and Goods, to the amount of £.300,000, but had not any Fire Engine there, nor any Fire Men resident there; but that there were several Fire Engines kept in the said City of Norwich.

That it is usual in Policies of Assurance in the Sun Fire Office to insert, over and above and besides the words of Exception contained
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in the present Policy, the additional words of "civil commotion" also.

The Question therefore for the Opinion of the Court is:

Whether the Plaintiff, under the circumstances of this Case, is entitled to recover in this Action?

This Case was twice argued at the Bar, and, after time taken to consider of it, Mr. Justice GOULD was of Opinion that the Malthouse, being burnt by a Mob, which rose to reduce the price of Provisions, it was burnt by an Ufurped Power, within the true Intent and Meaning of the Proviso in the Policy. He cited Popham, 122, and was of Opinion that Judgment ought to be given for the Defendants.

Lord Chief Justice WILMOT, Mr. Justice CLIVE, and Mr. Justice BATHURST, were of a different Opinion.

Lord Chief Justice WILMOT:

I am of Opinion that the firing of the Malthouse by the Mob, as described in this Case, is not a firing by the Ufurped Power meant in the Proviso.

Policies of Insurance, like all other Deeds and Instruments, which evidence the Agreements of Men with one another, must be construed according to the true Intent and meaning of the Parties who make them; and though my brother LEE says they should be construed liberally, and my brother BURLAND says they should be construed strictly, against the Insurer, who is the Speaker in this Proviso; yet I know of no other Rule, but to collect the Intention from the whole Instrument taken together, and to effectuate it; and the utmost

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to be inferred from the Rule is, that the turn of the Scale, in a doubtful Case, should be against the Speaker; because he ought to have expressed himself with more perspicuity. To find out this Intention is often very difficult; for when Agreements are committed to writing, all extrinsic Evidence of Intention is shut out; and words being the only marks of that Intention, it frequently happens, that sometimes from the imperfection and poverty of Language, and sometimes from the barbarous and inaccurate application of it, it is extremely doubtful and obscure what are the Ideas which the Parties denote by the words they employ to express them. Where they paint simple and determinate Ideas with precision and certainty, the features of the Mind are as visible as the features of the Body are in a picture: but the misfortune is, that words often paint very complex Ideas as distinct, simple ones; and then the eye of the mind is embarrassed in the pursuit of that particular Idea they are meant to delineate; and the words "Usurped Power" are two of those equivocal words which perplex this Question; and in all Cases of this kind, Courts of Justice have no other clue to lead them out of the maze, but to consider the import of the accompanying words, to take the general scope and design, as well as the particular sentence in which those words are found, into Consideration together: the Context must be carefully and accurately examined, and, above all things, the popular and ordinary Use of the words, in respect of the subject about which they are used, must be attended to.

Usage is one of the great master-keys which unlocks the meaning of words,

Quem penes arbitrium est et jus et norma loquendi.

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The words in the body of this Policy clearly take in all Fires, let them arise from what cause they will ; and therefore unless the Fire by the Mob, described as in this Case, is taken out of the general words by the Provifo, the Plaintiff's right to recover must be admitted.

The words of the Provifo are, " Fires which should happen by an " Invasion, Foreign Enemy, or any Military or Usurped Power what-
" soever."

It was first argued that the word " Invasion," and especially connected with the word " whatsoever," might mean any unlawful Attack ; but this was given up on the last Argument, and very rightly ; for every wilful felonious burning would have been included in such a Construction, and all the intermediate words would have been rendered insignificant and useless ; whereas they were plainly inserted to describe some wilful Fires in opposition to others. If they do not except all Cases, when Houses are fired wilfully, what are the Cases they do except ?

The Cases of Fires happening in the time of " Invasions from abroad, and Rebellions at home," are when the King's Government is externally or internally attacked, and Armies are employed to defend and support the Government established by Law, or to subvert it, and establish and support a Government usurped contrary to Law. These words are descriptive of Convulsions which shake the whole Nation to its foundations, and menace a dissolution of that system of Government under which we live ;—when the Laws lie dormant and inactive, and the functions of Magistracy are in a state of suspense, and firing Houses and Towns is known to be a necessary and unavoidable consequence, from friends as well as foes. These are the outlines of the Picture
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which these words draw on my eye upon the first reading of them, and the more I have looked upon them, the deeper the impression is upon my mind; and the time when this COMPANY was created, and which must be the time when these Policies were first framed, is very material, viz. 1720, only a few years after an Usurpation of Regal Power both in Scotland and England, and just at the dawn of another Rebellion ready to break out; and though the virtues of the Royal Family have totally extinguished every disloyal sentiment in this Kingdom now, yet it was not so romantic a Caution at that time, to guard against Fires happening from Rebels as well as from Enemies.

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As the Time furnishes a strong presumption, that a general Usurpation of Sovereign Power by the Pretender was then in contemplation, and was what the COMPANY meant by these words; so the Time furnishes a powerful Argument to me, that rebellious Mobs were not intended to be included in them.

It is truly said by the Defendants Counsel, that this was not many years after the Riot Act; that rebellious Mobs had been, and were, very frequent, and were not likely to decrease, from the ill humour which the year 1720 must have occasioned: and can it be supposed that they would descend to such minute Provisions as they have made about Trades, particular kinds of Commodities carried in and kept in this Malthouse, and at the same time leave Mobs and Insurrections to be signified by words which must be strained, and wrenched out of their popular meaning, to reach them, when the word "Mobs" would have completely spoken their Intention?

It has been said, because they had happened, and were more likely to happen than Rebellions, therefore they must intend to comprise

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them in these words; but I feel the weight of that Argument the other way: If this had been the more material object to attend to, they would have explicitly mentioned it.

But to come a little nearer to the words, and to a more critical examination of them. "Invasion and Foreign Enemy" manifestly relate to an external Attack; and as Pirates are said to be "Hostes humani generis," they may fall under the description of Foreign Enemies. But the general meaning of the words is a hostile Attack upon the Nation.

"Military and Ufurped Power" are the next words. The word "Power" has a variety of significations: it would be pedantic affectation to enumerate them; but in this place it can only mean Force, or Authority to use and apply Force; and the words which accompany it, must ascertain the nature and kind of Authority.

The word "Power," in conjunction with "Military," may mean to include "Fires from Soldiers;" from that class, rank, degree, and order, which is known and distinguished in all States by the name of "Military Power," in opposition to "Civil Power."

But the material word upon which this question turns is the word "Ufurped:" it certainly does not mean simply "used," for though sometimes "Ufurped," in Latin, has that import; yet, in English, it always carries the Idea along with it, of using that which another person has a right to use, and that is a frequent signification of the word in Latin; and indeed, in its legal, as well as its popular, signification, it describes the unlawful assuming the exercise of a Right belonging to another, as, the Ufurpation of an Advowson, usurping Franchises. Mr. Lock defines Ufurpation, getting into possession of that which another has a right to, viz. a change of Persons and
not

not of Forms and Rules of Government ; and in common parlance it marks a rebellious assumption of illegal Authority.

The Context shews that the executive Power of Foreign States, the Legal executive Power, and the Usurped executive Power of our own State, were the Powers the Company had in their eye. The Power usurped must be a Power “ ejusdem generis ” with the antecedent Powers pointed out in that proviso ; and the reason of excepting Fires from one of those Powers, might naturally lead them to extend the proviso to all of a similar nature.

It has not been contended, that these words take in Fires arising from Individuals, acting upon private motives : if one, or fifty in conjunction, had set this Malthouse on fire from any private pique or malice, it would be impossible to say the Fire had happened from an Usurped Power, unless the Act done made an Usurped Power, which is confounding two Ideas together, that must be carefully separated in examining this Question ; for the Power from whence the Fire must arise in this Case, must not owe its existence to the Act done, but must be existing, as an Usurped Power, before the Act done ; and therefore it is argued that here was a Power usurped before the House was fired ; that is, a Power Usurped to reduce the price of Provisions ; that this is a branch of Regal Power, and that it is not the totality of Regal Power which this proviso means.

There is no occasion to give any Opinion upon Cases where there is a general Insurrection, or Mobs “ more guerrino, arraiati cum vexillis “ explicatis, cum armis defensivis et offensivis, cum tympanis et “ tubis : ” where Captains are appointed, and the form and order of War appear in the face of it, and where the avowed purpose of such

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a Corps is to pull down "all" Bawdy Houses, "all" Meeting Houses, "all" Enclosures," or to abate the price of Provisions "every where;" for here it would clearly and indisputably amount to a levying of war against the King, and be a constructive High Treason.

In such a Case, I might have some doubt; though, according to the Idea which the word "Usurped" raises in my mind, I could not call such a Power an Usurpation, but a Power illegally assumed to do what no Power could lawfully do; for I see no Power in the King to reduce the price of Provisions; and if there is no such "Regal" Power, there can be no such "Usurped" Power, which I consider as a Power opposed to and standing in the place of a Power "de jure:" and though this doctrine of constructive High Treason in the Cases in Popham, 122. 2 Anderson, 4. Kelyng, 70. and many other Cases which have since happened, are determined upon very wise and salutary principles, we are here construing and expounding the words of a private Contract; and therefore the Question is not, what will turn a Riot into a Rebellion, in legal Consideration, but what the Parties mean by the words "Usurped Power," when Invasions and Armies and Soldiers are in their Contemplation, and the subject matter of the Proviso, where those words are found? and though the Law is fully settled upon that point, yet none but Lawyers, who had dipped into the Cases of constructive High Treason, could have thought this a Case of levying of War against the King, which carries, in the popular signification, a War to dethrone and attain the totality of his Government; and we should be very sorry, in a Question of private property, to pronounce people guilty of Constructive Treason, before Government had prosecuted them, and it appeared judicially, by the Record, that they had been guilty of it.

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But however the Law may stand upon a clear Case of constructive High Treason, or Rebellious Mob, yet this is a common Mob; and I know no difference between one Mob and another, except it be a Rebellious Mob, which, as described in the Cases, would amount to a levying War against the King; and in such a Case it might be more doubtful, because it would have "*speciem belli*," which is the Idea excited in my mind by the words "*Usurped Power*," and which is to act within the meaning of this Proviso.

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But here the Mob rose, Saturday, the 26th of September, 1766, on account of the price of Provisions, and threw the Flour about a Baker's House and damaged a Mill. Did they use any resistance, and refuse to obey the Law? The very reverse: the Proclamation was read, and they dispersed; there is not an eye of Rebellion in this; they hear the Law and obey it. The next day, another Mob arose on the same account: they began to pull down and fired the Malthouse, and damaged the Houses of two Bakers; they had no offensive weapons when they went to the Malthouse; thirty people dispersed them in fifteen minutes, and they never assembled more.

As this Mob does not agree in any single circumstance with the outward and visible form of a Rebellious Mob, as described in the Cases, so it wants the essential Property necessary to constitute a Rebellious Mob, viz. a universality of purpose respecting the whole Kingdom, "to pull down Bawdy Houses in general, to break open Prisons in general, to pull down all Enclosures;" 1 Hale's Pleas of the Crown, p. 155: for, if it was directed to particular Instances, as, not to make a general Abatement of the prices of Victuals or Corn, but in some particular Market, or within some Precinct, it was not a Rebellious Mob;

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Mob; by which I mean a Mob under such circumstances as would amount to a levying War against the King, that is, against his Office and Government.

They rose on account of the price of Provisions, and fell upon a Baker and Miller the first day, and upon a Maltster and two Bakers the second day. The utmost that I can collect from these facts is, that they thought the price of Provisions was owing to the Persons who followed those Occupations, and therefore chastised and punished them: for here is no setting a price, or forcing them to sell at a rate they thought a proper one. The Facts stated evidence Anger, Resentment, and Indignation against particular Trades, and it seems to have been a sudden swell of their Passions, transporting them into a Felony, but I see no marks of Treason in it, as described by the Cases; there was no previous Concert for that purpose, not the least avowal or manifestation of a design to make any general Abatement of the price of Provisions all over the Kingdom, or any where except Norwich. Supposing the destruction of Provisions to be a mode of abating the price of Provisions, and that by punishing these Millers, Bakers, and Maltsters, they hoped and meant to abate the price of Provisions at Norwich; yet it wants universality of purpose, which is the distinguishing feature of a *Rebellious Mob*, and it wants that "*speciem belli*," which Lord Hale lays so much stress upon in his describing and defining such a *Rebellious Mob* as would make the Actors in it Traitors.

But it is said, Fires from Mobs are more likely to happen than Fires from regular Armies, either acting for or against the State; and therefore that we should give these words a liberal, enlarged construction;

struction; and that it is a hard Case to make the Defendants answer for a Loss arising from a "vis major," not to be prevented by any Caution, and that, if doubtful, the scale should turn in their favour.

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The firing of Houses by Mobs does not often happen. Conflagration affects Friends and Enemies alike; and therefore pulling down Houses, when Mobs go beyond breaking of windows, is the common mode of expressing their resentment; but War knows no distinction between Friends and Foes; and firing Houses and Towns indiscriminately are the unavoidable consequences of it.

In my Opinion there is a prodigious difference between Mobs and Armies. The Laws, executed with spirit, will always suppress a Mob: the Magistrates did it with ease in this Case. The undaunted courage of an individual, or the personal appearance of a Man of Credit and Reputation, disperses or alluages these Fevers of the People: experience, as well as history, shews it, according to that beautiful simile in Virgil:

*Ac, veluti magno in populo quum sæpe coorta est
Seditio, sævitque animis ignobile vulgus;
Iamque faces et saxa volant; furor arma ministrat:
Tum, pietate gravem ac meritis si forte virum quem
Conspexere, silent—arrectisque auribus adstant:
Ille regit dictis animos et pectora mulcet.*

But suppose a Mob fired a house before they dispersed, all hands are instantly employed to extinguish it; but against Armies, neither the courage, nor character of individuals, can silence the thunder of cannon, or prevent the bursting of bombs; the inhabitants think of
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nothing but saving their own lives, and instead of the activity of Firemen to check Fire, Soldiers become Firemen to spread it: the probability of its spreading in one Case bears no degree of proportion to the probability of its spreading in the other; the danger is not so great, and the resistance much more easy; the reason for guarding against the one does not apply so powerfully as against the other.

As to the hardship of the Case, it is clear there are Cases of equal hardship, which are more likely to happen, and do more frequently happen, and yet cannot possibly be reached by these words; viz. the "felonious" firing by one or more, or by any Mob, if it is not a Rebellious one. A year seldom passes without our trying people for such Firings.

If the Law has not thought proper to provide against Cases equally hard, and twenty times more frequent, why should we extend it to a rare Case, when it is admitted to be ineffectual to reach a frequent one? As to the Cases of Carriers, Gaolers, and Lessees, they do not influence this Case; but because the Law, for wise reasons, makes them answerable against inevitable accidents, it does not follow from thence that a person must be answerable against such accidents, upon a private Contract, unless it is conceived in such Terms as manifestly indicate an Agreement to be answerable for them.

The general words of the Policy clearly manifest such an Agreement in all such Cases, not excepted by the Proviso; and I cannot think it a sound construction of these words to extend them, upon account of the hardship, to a very unusual Case, and, at the same time, leave the common and ordinary Cases, of equal hardship, totally unrelieved by them.

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The words of the Plea are, "unlawfully, riotously, and tumultuously assembled," which shew they had not the least apprehension of any thing more than of a common Mob.

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I am of opinion therefore that there must be Judgment for the Plaintiff.

And accordingly, there being three Judges against one, the Postea was delivered to the

PLAINTIFF.

IN THE HOUSE OF LORDS.

APPEAL FROM THE COURT OF CHANCERY IN IRELAND.

RICHARD KEILEY, Esq; Executor of JOHN KEILEY, Esq;
 deceased, and HENRY SNOW and SHAPLAND CAREW,
 Esqrs; and the Rev. HANS THOMAS FELL, Executors
 of ROBERT SNOW, Esq; deceased } APPELLANTS.

AGAINST

JOHN FOWLER, Son and Heir at Law and Administrator of
 RICHARD FOWLER, deceased, and Nephew and Ex-
 ecutor of WILLIAM FOWLER, deceased } RESPONDENT.

1st February,
 1768.
 Keiley against
 Fowler.
 V. Brown's
 Cases in
 Parliament,
 Vol. 6. 309.

2 L. 500.

SIR JOHN OSBORNE, Bart. being seised (amongst other Lands and Hereditaments) of the Towns and Lands of Sleady and Ballyker-rins in the County of Waterford in Ireland, in consideration of £.60 paid him by William Cronyn, by Lease dated December 2, 1719, demised the same to said William Cronyn, To hold from 1st May, then last, for nine hundred and ninety-nine years, subject to the Payment of the yearly Rent of £.100 sterling, and to a Quit Rent of £.16. 8s. per annum.

William Cronyn, being in possession of the Premises under this Lease, made his Will, dated July 15, 1726, and thereby devised (inter alia) in the following words, " I do leave and bequeath to my
 " Daughter, Jane Cronyn, all my worldly Substance, Lands, Stock,
 " Corn,

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“ Corn, Debts, and Household Goods, provided she marries by the
 “ Consent of my Executors hereinafter mentioned, subject notwith-
 “ standing to my Debts and Legacies: but in case my said Daughter
 “ should marry without the Consent of my Executors, she is to have
 “ for ever only twenty Cows and a Horse, as for her whole Fortune.
 “ I do hereby appoint my very good Friend Arthur Usher, in the
 “ County of Waterford, Esquire, and William Wigmore, of Cappa-
 “ quin, in the said County, Clerk, sole Executors of this my last
 “ Will and Testament, revoking and renouncing all former Wills.
 “ Furthermore I do appoint that, in case my said Daughter should
 “ die without Issue, that all my Substance, as before mentioned, shall
 “ return back to my Executors, to be distributed and disposed of
 “ as I shall hereafter direct; and that my Daughter’s Husband shall
 “ at least be worth £.1,500 sterling.”—The Testator then goes on,
 giving various specific and pecuniary Bequests to his Wife, his Rela-
 tions (the Fowlers) and several of his Friends, and to his Executors;
 and then closes his Will with the following Clause, “ And lastly, in
 “ case my forementioned Daughter, Jane Cronyn, shall marry with-
 “ out Consent of my Executors aforesaid, or shall die without Issue,
 “ I do ordain and appoint that all the Goods, Chattels, Lands, and
 “ other my worldly Substance, to her before bequeathed, shall return
 “ to my Executors, to be by them distributed in manner following,
 “ to wit: to my Nephew, James Donagon, £.100; to Hester Gambon,
 “ £.50 sterling; and to each of my Executors aforesaid, £.50; to
 “ my said Daughter twenty Cows and a Horse only, as before in this
 “ Case bequeathed; and the Remainder to be equally divided among
 “ the Children of my Sister, Elinor Fowler.”

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Fowler.

William Cronyn died soon after, and on the 6th May, 1727, his Executors proved the Will, and acted in the Trusts thereof, and possessed themselves of his Estate and Effects, and received the Rents and Profits of the said leased Lands, Jane being, at her Father's death, an Infant.

By Marriage Articles, dated the 10th February, 1731, in consideration of a Marriage intended to be had between Stephen Sowton and Jane Cronyn, with the Consent of the Executors, it was agreed (inter alia) that the said Term of nine hundred and ninety-nine years, in the Lands of Sleady and Ballykerrins, should be assigned to Trustees, in Trust to pay the Debts of the Testator, William Cronyn; and that the said Stephen Sowton should afterwards receive the Rents and Profits of the Premises, during the joint lives of himself and his intended Wife, Jane: and the Marriage was soon after solemnized.

Andrew Hill, William Cronyn's Brother-in-Law, in the year 1719, mortgaged a Leasehold Estate, called Salterbridge and Affane, to Hugh Henry, Esquire, in Trust for Thomas Stepney, Esquire, for securing £.500 and Interest; and William Cronyn and Francis Duggan joined with Hill, in executing a Bond and Warrant of Attorney to confess Judgment to Hugh Henry, as a collateral security for the same. Thomas Stepney dying, Hugh Henry, by deed, declared the Trust of the £.500, and assigned the Mortgage and Bond, and a Judgment entered up thereon by virtue of the said Warrant of Attorney, unto Charles Stepney, the surviving Executor of Thomas Stepney; and Charles Stepney, about October, 1732, issued a "fieri facias," in the County of Waterford, to levy upon the Goods of the said Andrew Hill,

Hill, £.609. 5s. 4d. The Sheriff's Officer, in collusion with Sowton and Hill, seized and sold by private Sale, to Sowton, the Lease of the Estate, so mortgaged to Henry, in Trust for Stepney, for £.128 only; and Sowton immediately took possession of the mortgaged Premises, and kept the same for six years and upwards, and during all that time received the Rents and Profits thereof to his own use. But Sowton finding himself obliged to pay the residue of the £.500 due to Stepney, notwithstanding the fraudulent Purchase obtained as aforesaid, he applied to John Fell and Nathaniel France to lend him £.600, and by Indenture of Mortgage, dated Nov. 11, 1763, (to which William Cronyn's Executors were made Parties, but refused to execute,) Sowton conveyed not only the said Leasehold Premises of Salterbridge and Affane, but also the Lands of Sleady and Ballykerrins, for the remainder of the respective Terms therein; and for better securing the repayment of the said £.600 and Interest to Fell and France, he executed a Bond and Warrant of Attorney to confess Judgment thereon.

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Stepney, on the 28th of December, 1736, assigned his Mortgage to Sowton, who by Indenture, dated 29th January, 1738, sold the residue of the Term of Salterbridge and Affane to Matthew Hales for £.730, but did not apply any part thereof to pay off the £.600 Mortgage to Fell and France; whereupon Fell and France filed their Bill of Foreclosure, in the Court of Exchequer in Ireland, against Sowton and Hales, and on the 13th May, 1741, the Cause was heard, and the Court decreed a Foreclosure and Sale of Salterbridge, and Affane, but refused to make any decree touching the Lands of Sleady and Ballykerrins.

Robert

Keiley against
Fowler.

Robert Snow, attorney to Fell and France, finding himself disappointed by this Decree in his design of obtaining the Lands of Sleady and Ballykerrins, in combination with Sowton and Hales, in October, 1742, by virtue of the Judgment, entered upon the Bond given by Sowton to Fell and France, seized the said Lands; and the Sheriff, by the procurement of Snow, in consideration of £. 800, sold the same to him for the residue of such Term as Sowton had therein, in Trust as to one Moiety for John Keiley, and as to the other Moiety for himself.

Jane Sowton died on the 19th October, 1743, without ever having had any Issue, whereupon William Fowler and Richard Fowler, two of the Children of Elinor Fowler, Sister of the Testator, William Cronyn, became entitled, together with the other Children of the said Elinor, to the Lease of Sleady and Ballykerrins; and in April, 1747, they filed their original Bill in the Court of Chancery in Ireland, against the Appellant, RICHARD KEILEY, the said Robert Snow, and several others, stating the Lease, and the several matters aforesaid, and that Snow and John Keiley, to the time of his death, and the Appellant, RICHARD KEILEY, his Executor, had ever since the Sale made by the Sheriff, under Fell and France's Execution, been in possession, and received the Rents and Profits of the said Lands of Sleady and Ballykerrins, amounting to the yearly sum of £. 180 sterling, above the reserved Rents thereof. The Bill therefore prayed an Account of Cronyn's Estate and Effects against Usher and Wigmore, his Executors, and that Snow and KEILEY might be decreed to deliver up the Lease of the said Lands to them, and the other Children of Elinor Fowler, and might account for the Rents and Profits thereof from the death of Jane Cronyn.

Arthur

Arthur Usher, one of the Executors of William Cronyn, by his Answer admitted the Will, and that the Testator died possessed of the said Lands of Sleady and Ballykerrins, and a considerable personal Estate. That the Respondent, and his Brothers and Sister, named in the Bill, were the Children of Elinor Fowler, the Testator's Sister, and that Probate of the Will was granted to him and Wigmore, his Co-executor. That they did not possess themselves of any of the Testator's Goods and Chattels, but permitted Jane to take the same as they were bequeathed to her. That they, at Jane's request, received the Rents and Profits for her Use, and accounted with Stephen Sowton, her Husband, for the same. Believed that Sowton became possessed of the Lands, and, without the Defendant's consent, mortgaged them to Fell and France for £.600, and executed a Bond and Warrant of Attorney as a collateral security, who sued out Execution thereon, and sold the Lands to Snow in Trust for himself, Snow, and KEILEY, as stated in the Bill. Believed that Jane died without Issue.

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Richard Wigmore, by his Answer, admitted himself to be the surviving Executor of William Wigmore, the Co-executor with Arthur Usher, and Administrator of his Assets to the value of £.1000 and upwards.

Robert Snow, by his Answer, said, he believed the Respondent, and his Brothers and Sister, were the Children of Elinor, the Sister of William Cronyn; and that William Cronyn was possessed of Sleady and Ballykerrins, under the said Lease, for 999 years, at £.100 yearly Rent. Admitted the Will of William Cronyn, and that the Executors proved the same. Believed Jane was the only Child of the Testator, and the Respondent and his Brothers and Sister Nephews and Niece

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Niece of the Testator. That Jane married Stephen Sowton, on 11th November, 1736, and that he made a Mortgage to Fell and France, and executed a Bond and Warrant of Attorney, whereon Judgment was entered, and “*feri facias*” issued to the Sheriff, who seized the said Leasehold Premises of Sleady and Ballykerrins, and about the 1st November, 1742, sold the same, and such other Interest as Stephen Sowton had therein, to Snow for £.890, in Trust, as to a Moiety thereof for John Keiley. Admitted that, before the said Purchase, he knew of the Will of William Cronyn, and the Title of the said Jane thereby; and that the said Bond and Judgment were executed by Sowton as a collateral Security for the said £.600, and that the Executors of William Cronyn were Parties to the Mortgage; but did not execute it. That Jane died in 1743, without Issue; but that he did not believe the Respondent and his Brothers and Sisters, by that means, or for that the Mortgage to Fell and France was made without Consent, had therefore any right to an Account of William Cronyn’s Affets. He admitted that he refused to give them possession of the Lands, or to account with them for the Rents and Profits thereof. Said that Stephen Sowton, from his Marriage, until Snow bought the Lands, received the Rents and Profits thereof, and that the Rents had ever since been received by KEILEY. That all the Testator’s Debts and Legacies were paid, except such as depended on the Devise over, which he insisted was void; and that he paid the said £.890; and computed the Lands to be of the clear yearly value of £.150 or thereabouts.

All the Defendants having answered, Issue was joined, and some Witnesses were examined, on behalf of KEILEY and SNOW, to prove
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the Sheriff's Sale to Sowton, and that the Marriage of Jane was with
 . Consent. And an Order was made, on Consent, that the Lease of the Keiley against
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 2d December, 1719, should be read on the Hearing, as proved.

The Cause came on to be heard before the Lord Chancellor of Ireland, on the 7th, 11th, and 17th of May, 1762, when his Lordship was pleased to Decree, that JOHN FOWLER, the Respondent, as Administrator of Richard Fowler, who was Executor of William Fowler, was entitled, under the Will of William Cronyn, to Two-sixth parts of the Lands of Sleady and Ballykerrins, for the remainder of the said Term of nine hundred and ninety-nine years, and to Two-sixth parts of the clear Rents, Issues, and Profits thereof, from the death of Jane Sowton, otherwise Cronyn; subject nevertheless to the Debts and Legacies of William Cronyn remaining unpaid; and awarded an Injunction to put the Respondent into Possession of the said Two-sixth parts; referred it to the Master to take an Account of the Rents, Issues, and Profits which Robert Snow and RICHARD KEILEY, and John Keiley, deceased, or any of them, had received, or, without wilful default, might have received, of the said Lands since the death of Jane; and also to take an Account of the Debts and Legacies of William Cronyn remaining unpaid, and of the personal Estate he was entitled to at his death, and to enquire into whose hands the same came, and how disposed of, with other usual directions.

In pursuance of this Decree, various Proceedings were had before the Master, who, on the 14th of June, 1766, reported a Balance due to the Respondent for his Two-sixth parts of the Rents and Profits of the Estate of £.1,395, and that his share of the unsatisfied Legacies amounted to £.92. 18s. 2d.

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The Cause came on to be heard, for further Directions on the Master's Report, on the 6th February, 1767, when the Lord Chancellor was pleased to Decree, that the Respondent should recover from the Appellants the £.1,395 reported due to him, with Interest for the same; and further Decreed Two-sixth of the Legacies, reported to remain unpaid, to be a Charge on Two-sixth of the Lands decreed to the Respondent.

From these Decrees the present Appeal was brought.

After hearing Counsel on this Appeal, the following Question was put to the Judges; viz. "When are the Bequests over, in case his Daughter should die without Issue, to take effect, according to the true Intent and meaning of the Will of William Cronyn; whether upon her death, and an indefinite failure of Issue at any time; or upon her death without ever having had Issue; or upon her death without Issue "living at that time;" or upon her death and failure of Issue during the lives of the persons to whom the Bequests are made, or any of them?"

16th Feb.
1768.

The Judges having taken time to consider, Sir JOHN EARDLEY WILMOT, Lord Chief Justice of the Court of Common Pleas, delivered their unanimous Opinion:

As this Question is framed, it is not necessary to enter minutely into the history or reason of the Law in setting bounds to the disposing Power of every species of property in this kingdom: it may be sufficient to say, that the Law, from an indulgence to the natural wishes of men to perpetuate their property in their own families, or the

the families they adopt, has given them a power of controul over it for one or more lives in being at the same time, and twenty-one years after in case of Infancy. But Public Convenience, sound Constitutional Policy, and the spirit of Liberty, which breathes through every part of our Law, will not endure any species of property to be chained down any longer; and therefore, if the Testator meant, in this Case, to lock up his leasehold and personal Estate beyond his daughter's life, and that this Bequest should hang like a cloud, to burst upon it, when there should be a failure of her Issue "at any time after her death," his Intention was an illegal one, and must yield to the Law, and the Bequest will be void. If, on the contrary, he intended, that this Bequest over should take place upon the event of his Daughter's dying without Issue, "living at the time of her death," then his Intention, being confined to a life in being, is agreeable to the rules of Law, and the Bequest over will be a good one; and therefore the Question proposed strikes at the true point of this Case, When did the Testator intend this Bequest over should take effect? For once fix that Intention, and the Law decides upon it without the least ambiguity.

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As the Law has been now settled about a Century, and universally known, it ought to appear clearly and explicitly, that the Testator meant an illegal Limitation. The proof of such an Intention lies upon the Party, who asserts it. If that Intention does not appear, if there is the least doubt about it; the presumption would be, that he meant a Disposition he was enabled to make by the rules of Law, and not a Disposition condemned by the Law.

If the legal supposition is to prevail, that every man knows the Law, no man in his senses could intend to do what he knew he

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could not do. And to see what he did intend, I will examine the Will; for the intent and meaning of the Will is the Question.

William Cronyn, having a daughter and a sister's children, being possessed of a leasehold and personal Estate, but no freehold Estate, devises, inter alia, as follows:

Here he stated the Will.

No man, who reads this Will, could entertain a doubt, what the Testator meant by it, if it had rested only upon the words "If my daughter die without issue." I speak now, and mean to be understood as speaking, abstractedly from all the Cases and legal exposition of these words; "if she die without Issue," that is, if she has no Issue at the time of her death, if she leave no Issue at the time of her death; not, "if she leave Issue, and that Issue fail two hundred years hence." Whenever that Issue fails, the Daughter will then become dead without Issue, but she did not die without Issue: for "dying" denotes that "punctum temporis," when the breath departs out of the body.

Such an exposition of these words as is contended for, produces this monstrous absurdity: it makes dying "with Issue" and dying "without Issue" to mean directly the same thing; they will have exactly the same operation; for if she dies with Issue, the Bequest over is not to take place; and if she dies without Issue, it is not to take place.

It is a shameful abuse of language to say, that dying without Issue on this day, the 1st of February 1768, and being dead without Issue, upon the 1st of February 1900, mean one and the same thing. It is repealing that great Law of all language, the Grammar, and confounding present and future time together. It is the most intolerable tyranny, the grossest barbarism, to say, they mark one idea; when
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the man who uses them, and all who read and hear them, are convinced they mark another.

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The Law presumes men “inopes consilii,” when they make their Wills; they are often made in their last illness, upon death beds, when the ablest understandings are impaired, and they cannot express themselves with that energy and propriety which they would have done in their healths; and therefore Courts make the words follow the Intention; enlarge, abridge, transpose, do any thing to reach the Intention, when they are sure they see and know it.

But wresting and torturing words out of their natural signification, to defeat a Testator's Intention, is directly counteracting the injunctions of the Law in expounding Wills, and racking a man upon his death bed, to make him say what he never meant or thought of; and therefore, independently of Cases, these words alone “die without Issue” would be sufficient to denote the time, when these Bequests over were to take place.

But, unfortunately for Devisees, claiming under bequests depending upon the contingency expressed in these words only, without any other words to restrict them, some of the greatest and ablest men have followed one another in saying, that, alone and by themselves, they must be construed to mean “being dead without issue at any future time,” and that Limitations over upon them are void.

I cannot help shedding a tear upon the introduction of such a solecism into the Law—But I will relate how it happened: it was owing to a fundamental mistake originally, in transferring a Construction which had been put upon these words, when applied to Estates of Inheritance, which might be entailed, to Leasehold and Personal Estates which could not be entailed.

I will

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I will shortly state the history of it: when Estates of Inheritance were devised to A.; and, if A. died without Issue, to B.; the Testator's Intention was clear, that B. was not to take whilst there was any Issue of A. It was equally clear, that he intended the Issue of A. should inherit his Estate. It was equally clear, that the Issue could take only by giving an Estate Tail to A. which would let in his Issue "ad infinitum;" and therefore, to effectuate that Intention, the Judges construed these words, to give an Estate Tail "by implication," and to have the same effect, as if he had given the Estate "to A. and his Issue," which in a Will gives an Estate Tail; and no Perpetuity could be created by such a construction, because the Estate Tail, and the Remainders over upon it, might always be barred by a Recovery. The words were thrown out of their natural signification to comply with the Intention.

Now examine these words, when applied to Leasehold Estates, which cannot be entailed. Leasehold Estates originally were of little estimation in the eye of the Law. In Edward the Sixth's time, all the Judges were of opinion, they would not bear any Limitation over at all. Then (a) ——— considered as good, ——— if use only ——— Devise to A. and if he died, living I.S. to him, ——— void. Afterwards ——— held to be good.

Then attempts were made to carry the Limitations of them further, and to entail them, and limit Remainders over upon them. But—No;—the Judges stopped here.—They said, you shall not entail them, and limit Remainders over upon them. First, you cannot entail them so as to make them transmissible in a course of succession

(a) There are blanks in the MS. which were probably filled up in delivering the Opinion.
to

to heirs: they must go to personal Representatives; and therefore, if a Term is devised to a man and the heirs of his body, he shall take the whole Interest. For his Issue cannot take it; and if the Limitation over upon it was to be good, it would produce a Perpetuity. For no Recovery could be suffered of it, as there might of an Estate Tail of Inheritance.

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Then come Cases where Terms were given in the same words as would have given an Estate Tail by implication upon an Inheritance, that is, to A., and, if he died without Issue, to B. Having determined that these words would give an Estate Tail upon an Inheritance, the Judges gave them the same effect upon a Leasehold Estate, and followed it with all the consequences of an Estate Tail, in respect of the Limitations over. Whereas the very reasons which induced the Judges to take the words out of their natural signification totally failed, when the words were applied to a Leasehold Estate. For the Issue could not take a Leasehold Estate in a course of succession, as they might take an Estate of Inheritance; and the danger of a Perpetuity was avoided by leaving the words to operate in their natural signification, which would tie up the Contingency to one life in being.

Having forced the words out of their natural signification to effectuate the Intention, they should have restored them to their natural signification again, when they found it would not effectuate the Intention, but entirely defeat it. Thus from giving these words the same operation, when applied to Leasehold Estates as to Estates of Inheritance, hath arisen this technical Rule, "that the words, if die without Issue, shall mean being dead without Issue at the remotest period of time;" and consequently,

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consequently, that a Limitation over upon so remote a Contingency is void.

(a) Select
Cases in Chan-
cery, 26.

Lord Nottingham echoes this Rule over and over again in the Duke of Norfolk's Case (a). Lord Macclesfield, Lord King, Lord Talbot, and Lord Hardwicke have followed one another in saying the same thing; and we do not mean to shake that Rule, because "stare decisis" is a first principle in the Administration of Justice, and this not from any fear of bringing Appeals or Writs of Error in particular Cases: Time guards them.—But because these Cases have furnished the light, by which Conveyancers have been directed in settling and transferring Property from one man to another. Upon the faith of an established Rule and the acquiescence of Judges, and of the whole Nation in it, Property to the amount of Millions may depend. The Judges now (as their Predecessors have always done) bow down to the Rule "pro salute populi," which is the supreme Law of every Community. But this Rule doth so revolt against the human understanding, that all the Chancellors, who have agreed to the Rule, at the same time have said, that, if there are any words, passages, or expressions, in a Will, to shew that the Testator did not mean to use the words in the "legal" but in the "vulgar" sense; that Intention manifested, should repel the presumption of their being used in their "artificial and technical" sense, and shall leave the words to re-assume their natural shape, and act in their proper character.

1 Peere Williams, 199. Nicholls v. Hooper. Lord Harcourt says, "Where a Legacy is given by a Will upon this Contingency, scil. if T. S. shall die without Issue, this shall be taken according to common parlance, viz. Issue living at his death; and it cannot be in-
 ✕ "tended

“ tended, that the Testator designed, that whenever there was a failure of Issue of THOMAS, which might be 100 years hence, that then these Legacies, which were meant only as personal Provisions, should take effect.”

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I will only mention a few cases: Penbury and Elkin, 2 Vernon, 758—766. and 1 P. Williams, 563. (see the Case.) Parker, Chancellor, admitted the Rule, but controuled it by converting five Letters into two. He construed “ after ” to mean “ at ; ” and yet “ after ” denotes an indefinite time, and “ at ” a definite one ; but as the legal import of the words, “ if die without Issue,” had unhinged the Intention, he thought it very right and justifiable to hinge it again, by forcing “ after ” out of its place, and construing it “ at.”

The Case of Target and Gaunt, 1 P. Williams, 432. Lord Parker said, “ to such of the Issue as he should appoint,” must be intended Issue then living, because it was to such Issue to whom HENRY might appoint it.

Pleydell and Pleydell, 1 P. Williams, 748. Issue was there held to mean Sons, as Lord Hardwicke declared in Sheppard and Lessingham, 29th and 30th October 1751. Ambler, 122. Forth and Chapman, by Lord Parker, 1 P. Williams, 663. A ray of his great genius irradiated that Case, and he gave the same words different constructions to reach the Intention.

Exell and Wallace, 22 June 1751. Lord Hardwicke said, “ the same words may have different operations, according to the different kinds of Estates intended to be limited ; and the Cases of Forth and Chapman, and Lord Glenorchy and Bosville, are express Authorities as to this point.”

2 Vez. 120.
318. and MS.
note.

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Maddox and Staines, 2 P. Williams, 421. Lord King. There, Issue was construed to mean Children, Sons and Daughters.—Atkinson and Hutchison, 3 P. Williams, 258. Lord Talbot. “Without leaving Issue,” that is, at the time of his death.—Beauclerk and Dormer. Heard at Powis House, 17th June 1742. 2 Atk. 308. Lord Hardwicke adopts the legal signification of these words standing by themselves; but puts the Question, Whether there is any particular circumstance in the Case, that can confine the words to Miss Dormer’s dying without Issue, at the time of her death?

(He then stated the Clauses, and the reasoning upon them.)

2 H. 6th.

Lord Hardwicke admits the principle, but found no such words. In Sheppard against Lessingham, Lord Hardwicke says, “Dying without Issue generally is too remote, as in Miss Dormer’s Case, but “here must mean, leaving Issue living at the time of his death.”

What do all these Cases prove? That they have admitted the Rule; that they have shut their eyes, as we do, upon the vulgar sense of the words, “if die without Issue,” and swallowed the legal sense, bitter as it is: this was done to avoid confusion, and disturbing personal Property enjoyed under the sanction of it; but, at the same time, they have caught at any word or expression, which might bring the Case out of the Rule.

They have remembered what Lord Hobart, (277.) recommends to Judges, “to be curious, and almost subtle, “astuti,” (which is the “word used in the Proverbs of Solomon, in a good sense, when it is “to a good end) to invent reasons and means to make Acts according “to the just intent of the Parties, and to avoid wrong and injury, “which by rigid Rules might be wrought out of the Act.”

Implication

Implication is only presumed Intention, and Presumption only stands till the contrary appears; and therefore, if other parts of the Will repel that Presumption, it loses all its power of directing the construction of the Sense.

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I will now bring the Case to its true point. What are the words in this Will, which shew the Testator meant a failure of Issue at the death of his Daughter, and not a failure of Issue at any future time after her death?

His Daughter, at the time of making his Will, was young. He gave her all: but two events arose in his mind; an improvident Marriage, and her death without Issue.

The first was checked by requiring the Executors Consent. If she marry without Consent of Executors, she is to have only twenty cows and a horse. This was an event to happen in her life-time; and though it would be absurd to refer the Words, as they stand in the last Clause, to her death, because she could not have the cows and horse after she was dead; yet it shews the confined extent of his mind at that time, and denotes that the other event in his contemplation was an event, "*ejusdem generis*," viz. a definite event; and it would be making his imagination to take a prodigious leap from an event, which must happen in her life, to an event, which might not have taken place till the next millenium.

If she had Issue when she died, he might naturally leave it in her power to do as she pleased with the property. It was most likely that her Issue would be benefited by it: but, if she had no Issue, he might think himself as proper a person to dispose of it to a stranger as she was.

The sense, which these two Provisions, taken together, most manifestly bear, is this: "My Daughter shall have nothing absolutely but

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twenty cows and a horse, unless she marries with the Consent of my Executors, and leaves Issue." Whereas, if the Bequest over is void, she will have the whole personal Estate for ever, though she leaves no Issue at all.

The next Words we rely upon are, that in the event of his Daughter's death without Issue, his whole Substance shall "return back" to his Executors, to be "distributed" and disposed of as he directed. Return back? when, and to whom? When his Daughter dies, and to his very good friend Ushart, and to Wigmore, his Executors? No—It is said, Executors must mean their personal Representatives, when there is a failure of her Issue at any time; and that they were intended, that is, the Office was intended, to make the Distribution, and not the Executors named in the Will. We are now upon Evidence of Intention; not what would be the legal consequence of such a Power, if it could be carried through all the mazy tracks of a legal Representation at a distance; but whether he extended his ideas beyond his two Friends Ushart and Wigmore, to whom he gives Legacies, in the event of his Daughter enjoying his whole estate; and an additional Legacy of fifty Pounds a piece, when either of the events happened, on which they were to have the additional trouble of making a Distribution.

All was tied up in his mind to Ushart and Wigmore personally, from the good opinion he had of their judgment and integrity to distribute equally. One great Trust was reposed in them, inseparable, unalienable, and intransmissible, and that was, their Consent to his Daughter's Marriage. He makes no distinction between the Executors, who were to exercise their judgment upon his Daughter's marriage, and the Executors to whom the Estate was to return back, and whom he entrusted

entrusted to distribute, and to whom he gave the Legacy of fifty Pounds a piece for their additional trouble. He meant the same persons: he carried his ideas no further than his Daughter, and Ushart and Wigmore. Keiley against
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The Law confines one of the Trusts to Ushart and Wigmore personally. The Testator clearly meant the same persons in "toto." That Legacy will not follow the personal Representatives of the Testator; for if transmissible, the personal Representatives of each Executor would be entitled: whereas the Executors of the Executor, who dies first, cannot represent the Testator; and the administrator of the surviving Executor does not represent him. The Representatives of the Testator are not entitled to the Legacy; for the Legacy was meant to those who were to distribute, and that could only take place in Ushart and Wigmore. If the Testator, therefore, appears clearly to have meant, that the Estate was to return to Ushart and Wigmore, and that he intended they should make the Distribution, and have the Legacies for it, then it excludes a possibility of an indefinite time, which might be five hundred years after they were dead.

But there is still a further and most decisive Evidence of Intention, arising from the persons, amongst whom the Estate is to be distributed, viz. the Children of his Sister.

The Testator had a Daughter, and six Nephews and Nieces, the Children of his Sister, Elinor Fowler. He says, "If my Daughter marries with Consent, and leaves Issue, she shall have all my Fortune; if not, I substitute the Children of my Sister in her place," (taking three or four small Legacies out of it.) These must be considered as Portions and personal Provisions for them.

There

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There are established known distinctions between Legacies by and to Strangers, and by Parents, or persons standing in the place of Parents.

In the latter case, they are always considered as Portions and personal Provisions ; which furnishes a strong argument of personality, and it was so admitted by Lord Hardwicke, in *Beauclerk and Dormer*, 2 Atk. 311. "Something plausible might be said, if this was to be construed as merely personal to her:" but in that Case, not only Miss Dormer, but Lord George and Lady Diana, were all strangers to the Testator.

Nichols and Hooper, 1 P. Williams, 198. Lord Harcourt lays a stress upon their being personal Provisions to Nieces. Suppose he had had a Son and five more Daughters, and had bequeathed in these words, "to his Son, and if he die without Issue, to be distributed amongst his Daughters." Would it not have been "Intention apparent," that he meant a personal Provision for his Daughters? His Nephews and Nieces stood one degree further off; but, from their proximity, they were the natural objects of his favour, after his own Children.

A Distribution amongst his Sister's Children, two hundred years hence, is too absurd and ridiculous to have entered into his head, or into the head of any man, who reads the Will: and though it has been rightly said, there is a particular person named in every Bequest over; yet here, the relation of the Devisees to the Testator denotes Portion and personal Provision, and a Distribution most likely to be made in their lives, if at all. And it differs from the common Case in another particular: the Testator seems to have meant Children living at the time of the Distribution.

There are many Cases upon the words "Children living," viz. some, when the Will is made: some, at the death of Testator: some, at the time when payable: some, at the time of Distribution: some take in Children born after, and suspend the Distribution.

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Every Case stands upon the Evidence of the Testator's Intention, arising out of each Will. In Questions of Intention, Cases, unless they coincide in words, and every other circumstance, never assist, but perplex the Exposition.

A Will is the picture of a man's mind; and one may as well look at the picture of one man to know the person of another, as look at the Will of one mind to know the mind of another.

And suppose four of his Sister's Children, born after the Testator's death, would have been entitled, if they had lived to a Distribution; but if they had died in their cradles, and only two had been living when Distribution was to be made, must the Father, as Administrator to them, have run away with four-fifths of the Estate, and the surviving Children have had only a sixth part apiece? If the Testator had meant Representatives, he would have said so. He confined it to Children.

I will cite a Case, confining Distribution to Children living at the time of Distribution, and where the Children of Children, who had died in the mean time, were not suffered to partake. Crook and Brooking, 2 Vern. 50 and 106. (which he stated). But suppose the Administrators of Children, who died before the Distribution, would be entitled; yet how could the Testator have thought of such a Distribution?

Every sixth part might be broken into six hundred parts, and the adjusting the proportions be impossible; or, if it could be done, the

Legacies

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Legacies would be crumbled into such minute morsels, as to be of service to nobody. And, in this particular, it differs from almost all the Cases, where the contingent Interest is limited to any single individual; whereas the pursuit of the Representative would not be accompanied with such insuperable difficulties. And there is something very whimsical in making the transmissibility of such a contingent Interest an Argument to prove that it can never vest at all to be transmitted.

The small Legacies of one hundred Pounds, and three fifties, are another Proof that he did not look at an indefinite failure of Issue. They must have been meant as personal Benefactions to the Legatees.

Every line and word of this Will shew, that the Testator's eye was upon a bounded prospect; the disobedience of his Daughter, or the death of his Daughter, marked the horizon all around him. His thoughts appear to have never stepped beyond it.

I am sensible that there is no difference between Devises of Leasehold and other personal Chattels: but still, when a man is talking of Stock and Corn, though perhaps not of itself a circumstance to determine upon, yet, in conjunction with other circumstances, it throws something into the scale.

If I have laid a good foundation of Evidence to shew that the Testator meant the death of his Daughter, and not the failure of her Issue generally, when this Bequest was meant to take place; then we are warranted, by what Lord Hardwicke says in *Beauclerk and Dormer*, to call the natural signification and import of the words "if die without issue" in aid of the other Passages, and as auxiliary to them; and this was my reason for troubling your Lordships at first with
stating

stating the true sense and meaning of them, and to which I must beg leave to refer, not as legionary forces or principals, but as auxiliaries. Keiley against Fowler. 

The truth is, these Words are condemned by the Law to be furly, rigid, inflexible, and immoveable, when they are alone; but, if they can but once be got into sensible company, they lose their gloomy, dogmatical, arbitrary disposition, and both speak and act as the rest of the company do: And combining all the words and passages in the Will, and the circumstances I have mentioned, together, they form a body of Evidence, which carries resistless conviction with them to our Understandings, that

“ THE Bequests over, in case the Daughter of William Cronyn should die without Issue, are to take effect, according to the true intent and meaning of his Will, upon the death of his Daughter without Issue, living at that time.”

WHEREUPON it was ORDERED and ADJUDGED, that the said APPEAL be DISMISSED; and that the Orders and Decree therein complained of, be

AFFIRMED (a).

(a) Vide Journals of the House of Lords, Vol. 32. p. 60.

IN THE HOUSE OF LORDS.

Between JOHN WILKES, Esq; Plaintiff in Error,

AGAINST

The KING, Defendant in Error.

1768.
 Wilkes
 against
 The King.
 Brown's P. C.
 Vol. 6. p. 345.

IN Michaelmas Term, 1763, Sir Fletcher Norton, Knight, his Majesty's then Solicitor General, (the Office of Attorney General being vacant) filed an Information, "ex officio," in the Court of King's Bench, against the Plaintiff in Error; stating, that before the printing and publishing the seditious and scandalous Libel thereafter mentioned, to wit, on the 19th April, in the third year of his present Majesty's Reign, his MAJESTY did make and deliver a most gracious Speech from his Throne, to the purport and effect therein set forth; and that the said JOHN WILKES most audaciously, wickedly, and seditiously devising, and intending to villify and traduce his MAJESTY, and his Government of this Realm, to impeach and disparage his veracity and honour, and to represent, and cause it to be believed among his MAJESTY's Subjects, that his said most gracious Speech contained Falsities and gross Impositions upon the Public, and that his MAJESTY had suffered the honour of his Crown to be sunk, debased, and prostituted, and had given his Name as a sanction to the most odious measures of Government; and also most wickedly, unlawfully, and seditiously

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feditiously devising, intimating, and endeavouring, as far as in him, the said JOHN WILKES, lay, to excite Disobedience and Insurrection amongst the Subjects of this Realm, and to violate and disturb the public tranquillity, good order, and peace of this Kingdom; after the making and delivery of the aforesaid Speech, (that is to say) on the 2d day of August, in the said third year of the Reign of our said Lord the KING, unlawfully, wickedly, seditiously, and maliciously published, and caused to be printed and published, a certain malignant, seditious, and scandalous Book and Libel, intituled "The North Briton;" in one part whereof, intituled "No. 45, Saturday, April 23, 1763," were then and there contained (amongst other things) divers malicious, seditious, and scandalous matters, to the effect in the Information set forth.

To this Information Mr. WILKES pleaded not guilty; and Sir Fletcher Norton, who had in the mean time been appointed to the Office of his Majesty's Attorney General, joined Issue in that Character for his MAJESTY.

In the Sittings after Hilary Term, 1764, the Cause was tried by a Special Jury of the County of Middlesex; and Mr. WILKES was convicted of the Offences charged in the Information.

Before Judgment on this Conviction, Mr. WILKES absconded, and went abroad, and Proceedings to Outlawry were had against him upon this Conviction; and on the 1st November, 1764, he was outlawed; but in Easter Term, 1768, he was apprehended, by virtue of a Writ of "Capias utlagatum," directed to the Sheriff of Middlesex, and being brought into the Court of King's Bench, was committed to the Custody of the Marshal of that Court.

In the same Term, Mr. WILKES obtained a Writ of Error upon the Outlawry; and having assigned Errors thereon, the same were

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argued in that and the following Term, and the Court of King's Bench reversed the Outlawry for a defect of Form in the Return of the Sheriff to the Writ of " Exigent."

Mr. WILKES's Counsel, having furnished to the Court some Matters, which, if available, ought to have been moved in Arrest of Judgment, and for a new Trial, the Court relaxed their general Rule, requiring such Applications to be made within the first four days of the Term immediately following the Conviction, and indulged Mr. WILKES with leave to move then, as well in Arrest of Judgment, as for a New Trial.

Accordingly it was argued by the Counsel for Mr. WILKES, that the Solicitor General was not the proper Officer, nor had any Authority to exhibit an Information; and that if he was vested with such Authority, it could only be temporary, during the vacancy of the Office of Attorney General; and it did not appear on the Proceedings, that the Office of Attorney General was at that time vacant; and on this ground it was moved that the Judgment should be arrested.

The Application for a new Trial was founded upon an Objection to an Order, made by the Lord Chief Justice of the Court of King's Bench, for amending the Information, after " Issue had been joined, and the Record of the Issue made up." But the Court unanimously over-ruled both the Objections, and took time to consider of the Judgment upon the Conviction till the 17th June 1768, when Mr. WILKES, being brought into Court to receive Judgment, was sentenced to pay a fine of £.500, and to be imprisoned ten calendar Months in the Custody of the Marshal.

There was another Information against Mr. WILKES, for publishing an obscene and impious Libel, intitled an " Essay on Woman," which was filed in the same manner, and tried at the same time with
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the other ; and upon this latter Information he was sentenced to pay another Fine of £.500, and to be imprisoned for twelve calendar Months, to be computed from the Determination of the first Imprisonment.

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To reverse these Judgments, Mr. WILKES brought two several Writs of Error in Parliament, and assigned the following Matters for Error: 1st. That it did not appear that Sir Fletcher Norton, by whom the Informations were exhibited, had any lawful Power, Warrant, or Authority to exhibit them, and therefore the Judgment was not sufficient in Law to convict him. 2d. That he (Mr. WILKES) was sentenced to be imprisoned for twelve Months, to commence at a future time ; whereas such Imprisonment ought to have commenced at and from the time of giving the Judgment, and not at any future time. 3d. That there was a variance between the Record and the original Information, the word "purport" having been altered to that of "tenor."

AFTER hearing Counsel on these Writs of Error, the following Questions were put to the Judges: 16th January, 1769.

1. " Whether an Information, filed by the King's Solicitor General, during the vacancy of the office of the King's Attorney General, is good in Law ?"
2. " Whether in such Case it is necessary, in point of Law, to aver upon the Record, that the Attorney General's office was vacant?"

Upon the Second Record :

3. " Whether a Judgment of Imprisonment against a Defendant, to commence from and after the Determination of an Imprisonment."

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“ ment to which he was before sentenced for another Offence, is good
“ in Law?”

And Sir JOHN EARDLEY WILMOT, Lord Chief Justice of the Court of Common Pleas, having conferred with the rest of the Judges present, acquainted the House, “ that they all agreed in Opinion ;” and then his Lordship delivered their Reasons.

AS to the first Question :

Same Day.

We think this Information, so filed, is good in Law.

By our Constitution, the King is entrusted with the Prosecution of all Crimes which disturb the Peace and Order of Society. He sustains the Person of the whole Community, for the resenting and punishing of all Offences which affect the Community ; and for that reason, all Proceedings “ ad Vindictam et Poenam ” are called in the Law, the Pleas or Suits of the Crown ; and in Capital Crimes, these Suits of the Crown must be founded upon the Accusation of a Grand Jury ; but in all inferior Crimes, an Information by the King, or the Crown, directed by the King’s Bench, is equivalent to the Accusation of a Grand Jury, and the Proceedings upon it are as legally founded ; this is solemnly settled and admitted. As Indictments and Informations, granted by the King’s Bench, are the King’s Suits, and under his controul ; Informations, filed by his Attorney General, are most emphatically his Suits, because they are the immediate emanations of his Will and Pleasure. They are no more the Suits of the Attorney General than Indictments are the Suits of the Grand Jury.

Indictments and Informations are both the Voices of those entrusted by the Constitution to awaken Criminal Jurisdiction, and to

put it into motion. Who are those persons entrusted? A Grand Jury for all Crimes; the King's Bench, as well as a Grand Jury, for Misdemeanors of magnitude.

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An Information, brought by the Attorney General for a Misdemeanor, is as much the Suit of the King, as Actions, brought by Attornies, are the Actions of their Clients, and not of the Attornies who bring them.

"The King sues by his Attorney," or "the Attorney sues for the King," are only different forms of expressing the same thing. It is equally good either way, as appears by the Cases in 2 Lev. 82. and 3 Keb. 127; and no legal Reason, but good manners and decency, as Lord Hale calls it, have given the preference of one Form to another. It is the King, who, by his Attorney, gives the Court to understand and be informed of the Fact complained of.

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Before the Statute, 4 and 5 W. & M. c. 18. every private man might lay his Complaint before the Court as the King's Complainant;—this was abused; and was checked by the Statute; but it left all other Informations as they were. What were then the King's Informations?—His right, of "Informing" the Court, was not subjected to the check which the Act set upon the right of Individuals.

The Legislature trusted the King as the great Constitutional Guardian of the peace of the Society. The mere suggestion of an Individual was too slight; he was under no Oath. The King is under the most solemn Sanction in every part of his great Office; and it is wise not to controul it: he is not to be put on a level with the meanest of his subjects.

The arguing that the Attorney General only, and no other Officer, was entrusted by the Constitution to sue for the King, either civilly

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or criminally, is a fundamental mistake. The Attorney General is entrusted by the King, and not by the Constitution; it is the King who is entrusted by the Constitution.

The great abilities of the Persons appointed to this Office have made it figure high in the imagination, and annexed ideas to it which do not belong to it; for he is but an Attorney, though to the King, and in no other or different relation to him than every other Attorney is to his Employer; and it is by degrees that he hath attained to that Rank which he now holds in the Law.

I find no traces of such an Officer for centuries after the Conquest; and that great Antiquarian, Spelman, under the word “*Serviens ad Legem*,” considers him, upon the authority of Passages cited out of Bracton, as the great Officer for Pleas of the Crown, and thinks the King had a Serjeant in every County for that Purpose; and in the Proclamations made even at this day, before any criminal Trial begins, the King’s Serjeant is mentioned, even before the Attorney; and the 5th Edward III. c. 13, which gives an Averment against the Sheriff’s Return of Imprisonment in Cases of Outlawry at the King’s Suit, mentions the King’s Serjeant before the Attorney, and subjoins “or any that will sue for the King;” which is a strong indication that the King’s Suits were not considered as then appropriated to his Attorney; and he had not then so much as the name of “Attorney General,” which means no more than the person generally employed to sue and defend for the King, exactly in the same manner as the person generally employed by your Lordships, in your Suits, is called your Lordships Attorney, without putting the addition of “General” to it; and the Suits instituted by the King’s Attorney, or by your Lordship’s Attorney, are both instituted, either by special
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and particular Directions, or under a general Authority, which is equivalent to a particular Direction for every particular Suit: and a Suit instituted by the Attorney General, is entitled the King and —, and the Jury are sworn between the King and —, in the same manner as in Suits between private Individuals. Whether the King, when there is an Attorney or Solicitor General, might, by one of his Serjeants, or by his Solicitor, when there is an Attorney, now file either a Civil or Criminal Information, it is not necessary to determine; but the Passage, cited out of the Harleian Manuscript, does not decide in the Negative; for the first part, in Henry the Eighth's time, orders the King's Solicitor to stop one Prosecution and commence another. The Office of Attorney General was either vacant or full at that time. If vacant, it proves the Solicitor stands in his place: if full, it proves that by particular Order, the King's Suit is not inseparably attached to the Office of the King's Attorney.

The latter part of the Passage, containing the Resolution of the 1st and 2d James I. is only the adjustment of a dispute between the Attorney General and the King's Serjeant, whether the King's Serjeant could institute a Suit so as to privilege it with respect to Fees, &c. in the ordinary course of Proceeding; and it was determined to belong to the Attorney General, in opposition to the Serjeant's Claim: but it does not follow from thence, that the King, if he had pleased, might not have empowered one of his own Serjeants to have commenced it: and a special antecedent Direction could not be necessary; for if the King afterwards avows the Suit, and pursues it, it is a Principle and Maxim that "*omnis rati-habitio mandato æquiparatur*;" but there is no occasion in this Case to have any recourse to such a Ratification; for the Solicitor General is the "*Secundarius*

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Attornatus;" and as the Courts take notice judicially of the Attorney General, when there is one, they take notice of the Solicitor General, as standing in his place, when there is none. He is a known and sworn Officer of the Crown, as much as the Attorney; and, in the Vacancy of that Office, does every Act, and executes every Branch of it. But, whether it be the one or the other, they only echo the King's Complaint, and his Application to the Court to act upon it. When the Attorney dies or is removed, must the great Criminal Jurisdiction of this Kingdom, in his Department, be suspended, till another is appointed? It is said the King may appoint one. But it is a matter of great deliberation and infinite consequence to have a person possessed of all the qualities necessary for that Office. Where is it to be found, that, in that interval, the noblest branch of the King's Regal Office becomes inactive, and the Subject's Right to Protection is in Abeyance? There is no such absurdity to be found in the Law; and an Hiatus in Government is so detested and abhorred, that the Law says, "the King never dies," that there may never be a "Cesser" of Regal Functions for a moment; but if this whimsical conceit were to take place, the death, or removal of the Attorney General, would suspend one of those Functions, though there was no Demise at all. That the Office of Attorney General devolves upon the Solicitor, is proved by such a chain of Authorities, as can leave no doubt in any man's mind upon this Question.

A course of Precedents and Judicial Proceedings in Courts of Justice, make the Law: it would be endless to cite Cases upon it. A course of Practice for a few years has been held to controul an Act of Parliament. The Case of Bewdley Corporation, in the 12th Queen Anne, 1 P. Williams, 207. Before the 4th and 5th of Queen Anne,

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Juries were to come out of the Hundred of that place where the Action arose. This was attended with many inconveniences. That Law directed that the Jury should come out of the Body of the County; but a Practice had prevailed in the Crown Office, to award the "Venire de Vicineto," as before the Act. It was referred to all the Judges. Their unanimous opinion was delivered by Parker, Chief Justice. The constant Practice and Precedents, both in the Crown Office and Exchequer, being "de Vicineto;" they established the Practice, and said, "to make a contrary Resolution in this Case, would be, in some measure, to overturn the Justice of the Nation for several years past." There was an interval of five or six years in that Case—but here there is near a Century.

The King and the Earl of Devon, Easter, 3 Ja. II. (a) Though the Information was filed by the Attorney General, it was taken up by the Solicitor General, and shews the same Powers. Proceedings were brought up into this Court, to found a Complaint upon; but there was no Writ. of Error. The Judgment was never reversed. There was not the least Complaint. This House acted upon it. This is a Recognition of his Authority.

(a) Middlesex. --- Information filed by Sir Robert Sawyer, "Attorney General," against William Earl of Devon, states, that he on the 24th April, 3 J. II. "vi & armis," at the City of Westminster, in Middlesex, within the Palace of our Lord the King there, to wit, in Whitehall, (the King being then abiding in the said Palace) one Thomas Colepepper, Esquire, then and there in the Peace of God, and our said Lord the King, did provoke and challenge to fight with him the said William Earl of Devon, with intention to kill and murder him the said Thomas, &c.]

Plea. --- And now (that is to say) on Friday, next after the Morrow of the Ascension of our Lord, in this same Term, before our Lord the King at Westminster, comes as well Sir Thomas Powis, Knight, "Solicitor General" of the said King, who, for our said Lord the King, now prosecutes in his proper person, as the said William Earl of Devon, in his proper person; and the said Earl says, &c.

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[Here the Chief Justice stated many Cases in the Exchequer, Chancery, and King's Bench ; and particularly, the Queen and Lawson, Easter, 7th of Queen Anne, which was an Information exhibited in the Exchequer by Sir James Montague, " Solicitor General," and where the Judgment was affirmed by Lord Cooper, Holt and Treby.]

The Attorney General is no more a sworn officer of the King's Bench than the Solicitor General.

As to the 2d Question :

The inserting the Vacancy of the Office of Attorney General in the Record sometimes, and at other times omitting it, shews it was thought a matter of indifference. There are more Criminal Informations in the Exchequer, without those words than with them. At most it could be only an Irregularity, which would not make the Information void ; because it is the King's Suit, and the Court is well founded in opening their Jurisdiction upon it ; all Irregularities must be challenged in time, and if not challenged, are waived ; and the Pleading and going to Trial are clearly a Waiver, if there had been any weight at all in this Objection ; but we think there is none. In this Case, the Information, though filed by the Solicitor, is brought into Court by the Attorney, who was the same person who filed it. By so doing, he has adopted it ; and it is become his Information to every intent and purpose whatsoever.

When filed—Process—when brought into Court—read over and charged with it. It is now done by the Officer—but it is for the Attorney. If there was any foundation—it should have been objected to then. If not, it must be considered as waived.

On

On the 3d Question :

We are of opinion that the Defendant, being convicted of two Offences, it was necessary that two Judgments should be pronounced, one upon each Information.

Fine and Imprisonment, or other corporal Punishment, may be awarded for such Offences as are contained in these Informations.

The Kind, and the Quantity, are left by the Law to the Discretion of the Court, which passes the Sentence ; and that Discretion is regulated by the nature of the Offence, and the circumstances which aggravate and extenuate it ; by the state and condition of the Delinquent, and the Imprisonment he has already suffered : and that Discretion is always exercised with that lenity and compassion which do so eminently distinguish the Administration of Criminal Justice in this Kingdom.

That sound Discretion led the Court to Fine and Imprisonment, as the proper and adequate Punishment for these Offences. A very large Fine might have amounted to perpetual Imprisonment : a very small Fine must necessarily have produced a prolongation of the Imprisonment. By mixing them together, the keen edge of each is taken off, and the consequence of a large Fine, or a very long Imprisonment, carefully avoided.

A Fine of £. 500, and ten months Imprisonment, is the Punishment for the treasonable Libel ; a Fine of £. 500, and twelve months Imprisonment, to commence from the Determination of the former Imprisonment, is the Punishment for the blasphemous Libel. The Objection is, that the Sentence for the blasphemous Libel is erroneous, because the Punishment is not to take place till another Punishment is ended, either by effluxion of Time or other sooner Determination of it ; which may be by a Reversal of that Judgment, or the

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the King's Pardon; and that all Judgments are to take immediate effect, and not to commence "in futuro." In general, the language of all Judgments for Offences, respects the time of giving the Judgment; though the Punishment, directed to be inflicted, is in no Case inflicted immediately; and in many Cases, the Judgment directs the Punishment to be "in futuro," and must be so according to the nature of the Punishment.

In Petit Larceny—to be whipt three Market Days successively—to set a man in the Pillory three times, at a week's or a month's distance—to find Security for good Behaviour from the end of a certain Imprisonment, or an uncertain one, as those Imprisonments are, where a Fine is to be paid.

In Treasons and Felonies—a certain known Judgment, which cannot be departed from, viz. in the present Tense of the subjunctive Passive: but in Misdemeanors, where Punishment is discretionary, the Limitation, as to Time, seems only to be, that the Punishment shall take place before a total dismissal of the Party: a Punishment shall not hang over a man's head when he has been once discharged; that is properly a Punishment "in futuro." But whilst he remains under a state of Punishment, whilst he is suffering one part of his Punishment, he is very properly the object of a different kind of Punishment to take place during the continuance of the former, or immediately after the end of it. And every Case of this kind must depend upon the peculiar circumstances which attend it.

In this Case, it must be assumed, that Fine and Imprisonment were the proper kind of Punishment to be inflicted for these Offences; because the Court, intrusted by the Constitution with deciding upon the Punishment, has said so. The Facts and Circumstances which guided their Judgment, in that respect, are not before your Lordships.

ships. They hear a Report of the Trial, and Affidavits of every Fact which aggravates or alleviates the Offence; and therefore your Lordships must now proceed upon a supposition, that Fine and Imprisonment were the adequate Punishments to be inflicted for each Offence. You will be disposed to say and to think so, because they are the mildest and gentlest Punishments.

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The Punishment might have been inflicted different ways.

1st. By Imprisonment for twelve months; but as he was already sentenced to ten months, it would have been only an Imprisonment for two.

2d. By Imprisonment for twenty-two months; which would, in effect, have been for twelve.

But this would have been most grossly unjust, because if the first Judgment should be reversed; or he had been pardoned, he would have been imprisoned twenty-two months, when the Court only intended an Imprisonment of twelve.

3d. The Court might have laid a Fine of £. 1,000, with a short Imprisonment for one Offence; and a small Fine, with an Imprisonment for twenty-two months for the other.

This would have been equally unjust—for the Offences are different, and have no relation to one another. The Prosecutions are distinct, and the Records as separate from one another as if there had been two separate Delinquents; and the Offences on each Record, must be as separately and distinctly estimated; and though Judgment happened to be passed at the same Time for both Offences, yet the Rule of admeasuring must be the same as if the Judgment had been pronounced at different times.

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The Punishment must be proportioned to the specific Offence contained in the Record, upon which the Judgment is then to be pronounced ; and must be neither longer nor shorter, wider nor narrower, than that specific Offence deserves. . The balance is to be held with a steady even hand ; and the Crime and the Punishment are to counterpoise each other ; and a Judgment given, or to be given against the same person for a distinct Offence, is not to be thrown into either scale, to add an atom to either.

To lay a Fine of £. 1,000 for one Offence, and twenty-two months Imprisonment for the other, when the Court thought a Fine of £. 500, and an Imprisonment of ten months, was the proper and adequate Punishment for one Offence, and a Fine of £. 500, and an Imprisonment of twelve months for the other, would have been twisting the two Offences and their Punishments together, and a departure from the first principle of distributive Justice, which commands all Judges to inflict that Punishment, and that Punishment only, which they think commensurate to the specific Crime before them ; and it might have been productive of the same injustice I have already mentioned, viz. the Judgment in one might be reversed or pardoned ; and the Delinquent would then be subject to a larger Fine or a longer Imprisonment, than the Court intended to subject him to for one of the Offences only.

We cannot explore any mode of sentencing a man to Imprisonment, who is imprisoned already, but by tacking one Imprisonment to the other, as is done in the present Case.

It is not letting the Judgment for the first Offence vary the Punishment, or influence the quantum of it in the other ; but only providing,

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ing, from the situation of the Delinquent, to effectuate the Punishment the Court thought his Crime deserved. It is shaping the Judgment to the peculiar circumstances of the Case; and the necessity of postponing the commencement of the Imprisonment, under the second Judgment, arises from the Party's own guilt, which had subjected him to a present Imprisonment; and therefore the Question really is, Whether a man, under a sentence of Imprisonment for one Offence, can be sentenced to be imprisoned again for another Offence? If he can, this is the only Form by which it can be done consistent with Justice. If it cannot be done, then, in all Offences which are punishable only by Fine and Imprisonment, if a man has committed twenty, and has been sentenced to Imprisonment for one of them, he must be fined for all the rest, which will amount to perpetual Imprisonment with nine parts in ten of the people most likely to commit such Offences: Or an Imprisonment must be directed for every Offence after the first, inadequate and disproportionate to it.

For suppose twenty Offences of the same malignity, and meriting exactly the same Punishments—if six months Imprisonment were the punishment directed for the first Offence; the second must be twelve months; and, proceeding progressively, the twentieth must be ten years: and thus six months and ten years will be the punishment for Offences which ought to have been punished exactly alike. Or, if it be an Offence where Whipping or Pillory might be inflicted, the alternative of a moderate Imprisonment will not be in the power of the Court to inflict; but they will be under the necessity of laying a large Fine, or directing one of the other severe corporal Punishments.

In Dr. Bonham's Case, 8 Co. 107. The Charter granted by King Henry VIII. confirmed by an Act of 14 Hen. VIII. c. 5. gives the

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Censors of the College of Physicians a Power to punish Physicians for a mal and insufficient Administration of Physic, by Amercement, Imprisonment, &c.

Dr. Bonham was convened, examined, and found insufficient by the Censors. He was amerced £.5, to be paid at their next Meeting; and “*deinceps abstineret, etc. quousque Inventus fuerit sufficiens*” “*sub pœna conjiciendi in carcerem, si in premiffis delinqueret.*”

He persevered to practise, and they summoned him again—He made default. The Censors ordered him to be arrested, and afterwards he came before them, and being asked to submit to their Authority, he refused; and they committed him, and awarded that he should continue in Gaol till they released him.

It appears from this Case, 1st. That he was under no prior Sentence of Imprisonment, as here.

2dly. That after the Judgment of his Insufficiency, he was dismissed, with a threat of Imprisonment only; and was afterwards committed to Prison for not submitting to their Authority.

Whereas the Delinquent here was never dismissed, nor out of Custody, for a Moment.

3dly. It was a special Power and Authority of a very singular and despotic nature, committed to private persons, and therefore to be executed strictly; and when they are empowered to imprison, if they find a person insufficient, the Punishment must immediately follow the Judgment; because, if suspended a day, it might be suspended a year. If totally dismissed, and the Party is at liberty, the power over him is determined.

So in the Case of the 27th of Henry VII. Y. B. on the Statute of Westminster 2d. 13 Edward I. c. 11.; if Bailiffs, &c. are found in

Arrear, “arrestentur corpora eorum, et per testimonium Auditorum
 “ejusdem compoti, mittantur et liberentur proximæ Goalæ Domini
 “Regis in partibus illis.”

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No time was limited; they must commit immediately.—In that Case, it was contended on the Plea, that he had been at large; and then their Power over him was determined, and so that what they did after, was “tortious.” It was a special Power and Authority, to be exercised strictly; and therefore held that the Commitment must be to the next Gaol, whether in the County or not; and if false Imprisonment was brought against Auditors, they must shew that they pursued their Power. And the same answer applies to the other Cases upon the Statutes of forcible Entries.

[He then cited various other Precedents, particularly the Case of The King and Dalton, 3 Geo. I. 1716, in which the first Judgment was given in July preceding, upon an Indictment for seditious Words against the King; and the Punishment was a Fine of twenty-five Marks and Commitment for one year, and to find Sureties for three years. There was a second Conviction, in July, of a like Offence, and Judgment of a Fine of twenty-five Marks and Commitment “pro spacio unius anni integri post expirationem prior: Judic: Im-
 “prisonament: versus eum nuper adjudicatum.”]

IN Answer to the Questions therefore proposed by your Lordships, our unanimous Opinion is:

1st. That an Information, filed by the King’s Solicitor General, during the Vacancy of the Office of Attorney General, is good in Law.

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2dly. That in such a Case, it is not necessary, in point of Law, to aver upon the Record that the Attorney General's Office was vacant.

3dly. That a Judgment of Imprisonment against a Defendant, to commence from and after the Determination of an Imprisonment to which he was before sentenced for another Offence, is good in Law.

WHEREUPON it was ORDERED and ADJUDGED,
that the Judgments of the Court of KING's BENCH
be

AFFIRMED (a).

(a) Vide Journals of the House of Lords, Vol. 32. p. 222.

IN THE COMMON PLEAS.

GEORGE BALLY, Clerk, Rector of Monkton, Hants, Plaintiff,

AGAINST

JAMES WELLS, Assignee of JAMES WHITMARSH, Defendant.

THIS was an Action brought by GEORGE BALLY, Clerk, Rector of Monkton, in the County of Southampton, against JAMES WELLS, Assignee of James Whitmarsh, for the Breach of a Covenant contained in a Lease, made by the said GEORGE BALLY to James Whitmarsh, dated 15th Nov. 1766. By this Lease it was witnessed, that in Consideration of the Rent and Covenants on the part of J. Whitmarsh, his Executors, Administrators, and Assigns, the said GEORGE BALLY demised to him all the Tithes arising, &c. out of the Farms and Lands in the Parish of Monkton, from the 10th of October last past, for the term of six years, at the yearly rent of £.96. 4s.

This Lease, besides other usual Covenants, contained the following; viz. "And the said James Whitmarsh, for himself, his Executors, Administrators, and Assigns, doth thereby covenant and agree, not to let any of the Farmers, now occupying the estate at Monkton, have any part of the Tithes aforesaid, without the consent of the said GEORGE BALLY, in writing, first had and obtained."

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10 Geo. III.
1769.
Bally against
Wells.
Vide 3 Wil-
son, 25.

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Bally against
Wells.

It contained also a Covenant from James Whitmarsh, his Executors, Administrators, and Assigns, to find and allow unto the said GEORGE BALLY, sufficient Wheat Straw for thatching of any of the Premises upon the Parsonage then in his Occupation.

In January, 1767, James Whitmarsh assigned his Interest in this Lease to the Defendant, JAMES WELLS, who, notwithstanding the above Covenant, did let divers Farmers, occupiers, have part of the Tithes, without the Consent of the said G. BALLY, in writing, according to the Lease, and contrary to the Form and Effect of the Covenant of the said James Whitmarsh and his Assigns.

To the Declaration, stating these Facts, the Defendant, JAMES WELLS, answered, that there is not any thing contained in the Declaration sufficient to maintain the Action; and that he hath not occasion, nor is he bound by the Law of this Realm, to answer; and for Plea in this behalf says, that he hath not broken the said Covenant as complained of; and hereupon Issue was joined.

A Verdict being found for the Plaintiff, it was moved in Arrest of Judgment, that an Action does not lie against the Assignee; for that it is a Covenant merely personal and collateral, binding the Lessee only; also that Tithes are incorporeal, lying in Grant, and therefore that such a Covenant cannot run with them.

Lord Chief Justice WILMOT delivered the Opinion of the Court:

An Objection in Arrest of Judgment has been made, that the Covenant in the Lease, “ not to let any of the Farmers of the Estate have any part of the Tithes without the Consent of the Lessor,”

is

is a mere collateral, personal Covenant, confined in its Operation to the Lessee himself, and that the Assignee of the Lessee is not affected or bound by it: that Tithe is an incorporeal Inheritance lying in Grant, which will not endure such an annexation of Covenant to it, as will pass with the Tithe into the hands of an Assignee: But, upon Consideration, we think the Action may be supported, and that the Intention of the Parties may have its full effect, without breaking in upon any adjudged Cases, or shaking any of the Distinctions already established.

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The Intention of the Lessor, in requiring this Covenant, was to prevent an Unity of Possession of the Land and the Tithes; it was to keep them always in a state of actual perception, and thereby to guard against all the Inconveniences which arise from the not receiving Tithes in the usual and accustomed manner: and therefore this Covenant is really no more, than that the Lessee and his Assigns shall take the Tithes in kind, that there may be a continuing, visible, and notorious Evidence, not only of the right to the Tithes in kind, but of the manner of taking them; for though Tithes are due “communi jure;” yet temporary Compositions have laid the foundation of many Moduses; and if there is any particular mode of Tithing, the Unity of Possession in time wears out the traces of it; and therefore this Covenant was a Provision made for the maintaining and supporting the thing demised, and indeed for preserving the very existence of it.

There was another motive for compelling the Lessee and his Assigns to take the Tithes in kind, which was to enable them to perform the Covenant of allowing sufficient Wheat Straw for thatching any of the Premises upon the Parsonage. For though the Lessee and his Assigns might procure the Straw elsewhere, and the Covenant is not so worded

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as to restrict the Delivery of the Straw arising from the Tithe; yet the Lessor's eye was certainly upon the Tithe, as the natural Fund for serving the Parsonage; and this furnishes an additional reason for connecting the Covenant with the Tithe to which it relates, and cementing them in such a manner as to make them pass together: and the Equity being clear, that the Assignee, who must have come in with full notice of this Covenant, should stand in the place of the Assignor, and be bound by it. If the Equity and the Law can be mixed together, and made to flow in the same Channel, it must be the Inclination of every Court of Law to give a complete Relief, without sending the Parties to another Court to obtain it at a great expence. If the Law be settled, we will not disturb it.

To see whether the Equity of this Case can be got at in a Court of Law, I will consider how the Law stands, in respect of Covenants following the thing demised into the hands of Assignees; and if there is any difference between Land and Tithes.

Spencer's Case, 5 Co. 16. states all the distinctions very clearly. Covenants in Leases extending to a thing "in esse," parcel of the Demise, run with the Land, and bind the Assignee, though he be not named, as to repair, &c. And if they relate to a thing not "in esse," but yet the thing to be done is upon the Land demised, as to build a new House or Wall; the Assignees, if named, are bound by the Covenants: but if they in no manner touch or concern the thing demised, as to build a House on other Land, or to pay a collateral Sum to the Lessor, the Assignee, though named, is not bound by such Covenants: or if the Lease is of Sheep, or other personal Goods, the Assignee, though named, is not bound by any Covenant concerning them. The reasons why the Assignees, though named, are not bound

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in the two last Cases are not the same. In the first Case, it is because the thing, covenanted to be done, has not the least reference to the thing demised; it is a substantive, independent Agreement, not "quodam modo," but "nullo modo," annexed or appurtenant to the thing leased. In the Case of the mere Personalty, the Covenant doth concern and touch the thing demised; for it is to restore it, or the value, at the end of the Term: but it doth not bind the Assignee, because there is no Privity, as there is in the Case of a Realty, between the Lessor and Lessee and his Assigns, in respect of the Reversion: it is merely collateral in one Case; in the other, it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together, and to constitute that Privity, which must subsist between Debtor and Creditor, to support an Action.

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To carry the Lien of a personal Obligation over to an Assignee, and to make him the object of an Action at the Suit of a Person with whom he did not originally contract, he must in all Cases, where something is to be done "de novo," be expressly named; and there must also be a Privity between the Assignee and the Person to whom he becomes engaged; and the Covenant must respect "the thing leased," which I consider as the medium creating the Privity between them. The "Chose in action," which of itself is not assignable, loses that property under those circumstances, and, in a waiting dependent state, follows its principal; and Assignees of Leases become liable to Assignees of the Reversion, and Assignees of Reversions become liable to Assignees of Leases; as, where Lessors covenant to repair, to renew, Moor, 159. Reversions are bound. Covenants between Partners, to acquit of Suit, run with the Land; to perform Divine Service, within a Manor, with

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the Lord of that Manor, and his Heirs, follows the Manor, into whose hands soever it comes, whether by Descent or Purchase. Covenants which run and rest with Land, lie for or against Assignee at the Common Law, though not named; "terra transit cum onere;" Cro. Eliz. 552. Hyde v. Dean and Canons of Windsor. The same doctrine, 1 Rolls Rep. 359. They stick so fast to the thing on which they wait, that they follow every particle of it; Cro. Car. 221. Congham v. King, Sir W. Jones, 245; Conan v. Kemise. For if Lessee assigns twenty parts to twenty persons, he may follow the Assignee of every part. If a Reversion is broken into parts, the Assignee of each part may sue. So if a Covenant relates to the improvement, melioration, and mode of Cultivation of the Estate, Covenant binds an Assignee, though not named, Cro. Ja. 125. Cookson v. Cock.

All these Cases clearly prove, that "inherent" Covenants, and such as tend to the support and maintenance of the Thing demised, where Assigns are expressly mentioned, follow the Reversion and the Lease, let them go where they will.

Is there any difference between Lands and Tithes as to the annexation of Covenants? It is said Tithes are an incorporeal Inheritance, and lie in Grant; that a Rent cannot be reserved, because not open to a Distress; that there is a privity of Contract only between the Lessor and Lessee, which neither the Lessor, nor the Lessee, can transfer to any other Person. As to their being incorporeal, unless we consider the Covenant to be a material substance, and to require some solid Body to stand upon, it may wait, and be dependent, upon an incorporeal as well as a corporeal Estate. If we embody a Covenant, and realize it in our minds, as we do a Castle, it certainly cannot be built in the air, and we can have no idea of its existence, independent

independent of Land, and detached from it; but if we consider a dependent Covenant, as it really is, an Agreement to do, or to omit to do, something which respects the thing on which it depends, and to which it relates, and divest our minds of all ideas of matter, a Covenant may be annexed and pass with an incorporeal Inheritance as well as with a corporeal one; and what is Land, but the Profits of it? and what is Tithe, but the tenth part of the Profits renewing annually upon it? The one is a Right to take away the tenth part when it is severed; the other is a Right to take away the other nine: they are tangible, visible, and palpable, and partake of the same qualities, in every respect, as Lands themselves; Dyer, 85. b. They are so far realized by the Stat. 32 Hen. VIII. that they are to be sued for and recovered in the same manner as Land, and an Ejectment, or an Affize, lies for them; and however unreal or bodiless they might be at the Common Law, the Act has given them the Qualities and Property of Lands themselves, in point of Remedy against an unlawful Possessor or Disseisor of them; and every reason which applies in Justice to passing Land "cum onere," applies to passing Tithe in the same manner.

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It has been argued and admitted, that a Rent cannot be reserved out of Tithe; and Co. Lit. 47. a. 2 Saund. 302. Dean and Chapter of Windfor v. Gover; and the Act of 5 Geo. III. c. 17. have been cited. But what is the true sense and meaning of that Position? That it is not properly a Rent, because there is nothing to distrain upon for it: [Rent-secck could not be distrained for, and yet it is a Rent;] for it is a Rent where it may be distrained for, as Rent reserved by the King, because he may distrain upon any Lands the Lessee has; it does not issue "out of" the Tithes, but is a payment "for" them; Cro. Ja. 452.

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Dobitoſte v. Curteene. If a Barn, worth £.4 per ann. and Tiſhe, are both let together at £.100 per ann. reſerving Rent; “in point of
“Remedy it does not iſſue out of Tiſhes, but only out of the Barn,
“where a Diſtreſs may be taken; yet the Rent reſerved is greater,
“having reſpect to the Tiſhes;” and, in caſe of eviction, there muſt be an Apportionment; which proves that, in point of “Render,” Rent does iſſue out of the Tiſhes, though not in point of “Remedy.”

It is inſiſted, in Sir Thomas Raymond, 18. Tippin and Grover, that a Rent out of Tiſhes appertains to the Reverſion, for it is a Rent, though not in point of Remedy. It was argued, “e contra;” but Couſel, perceiving the Opinion of the Court to be againſt him, prayed a Diſcontinuance, which was granted.

Jewell’s Caſe, 5 Co. 3. was a Leaſe for Life; and as there was no Remedy by Action of Debt for ſuch a Rent, the Leaſe was void. Indeed, it is ſaid at the end of that Caſe, that a Leaſe for years would have been ſo; but that was extrajudicial; and in a ſubſequent Caſe, Cro. Ja. 111. *Talentine v. Denton*, the Law was held to be otherwiſe.

The Caſe in 2 Saund. 302. was not determined; but as far as it goes, the Court ſeemed to incline that it was ſuch a Rent as would go with the Reverſion, and that the Aſſignee ſhould be obliged to pay it.

The 5th Geo. III. c. 17. recites it only as a doubt, and provides for it; but before, the Law was clear that the Rent would go with the Reverſion, and that an Action of Debt would lie for Rent on a Leaſe for Years: It always went with the Reverſion to Grantees or Heirs at Law, and the legal Remedy goes along with it. The Succeſſor is the ſame as an Heir.

2 Vern. 423. is only a saying of Counsel: it was not said with reference to Tithe, viz. "possibly the Assignees might not be liable at Law, if it was an incorporeal Inheritance, for they had not privity of Estate." 1 Salk. 198. Lord Raymond, 322. Grant of Rent-Charge and Covenant for Enjoyment, free from Taxes; the Question was, if it follow the Land into the hands of Assignee; Holt, in Salk. thought not, but there was no Judgment; and Lord Raymond, with three Judges, were of a different Opinion against Holt; and this is the better Opinion, if Notice of the Covenant repel the Right of deducting the Taxes; and the Case of the Covenant to acquit of Suit from one Parcener to another, is in point in support of it. 5 Co. 24. b. Dean and Chapter of Windfor's Case. If Lessee covenant to discharge Lessor, "de omnibus oneribus ordinariis & extraordinariis, and to repair," Action lies against Assignees.

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If there is no difference between Land and Tithe, the only Question in this Case is, whether a Covenant, expressly naming the Assigns to receive the Tithe in kind, will follow and accompany the Lease into the hands of the Assignee, and bind him to a performance of it. We are of opinion that it will; and if the Covenant had not named Assigns, it might be very plausibly argued that it would have bound him as effectually as a Covenant to repair, or occupy the Estate in any particular manner prescribed by the Lessor. The Covenant "to repair" clearly binds an Assignee, though not named; and according to Moor, 159. even to build a Wall, though Assignees are not named, is an inherent Covenant, and binds them; "By the acceptance of the Possession, he makes himself subject to all Covenants concerning the Land, though not to collateral Covenants; and Covenants of Repair, and of building Walls or Houses, are Covenants inherent"

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“herent” in the Land, with which the Assignees, without special words, shall be bound.” But it is not necessary to discuss that Question, (and Spencer’s Case is contrary,) because the Assigns are expressly mentioned here; and therefore in a Lease of Land, they would clearly be bound by all Covenants for the performance of what is to be done upon the Land; and the Case in Cro. Ja. is an Authority in point, that Covenants, prescribing how Land shall be occupied, would bind the Assignees, though not named: a mode of occupying the “thing let,” is so interwoven with the original Contract, as to become an essential part of it; it is as much a part of the Consideration of the Lease as the Rent is; and therefore, whenever that Contract is assigned, the Assignee must take the whole Contract together.

What is this Covenant, but a mode of Occupation prescribed by the Lessor, for the reasons already mentioned? It is laying down a Rule how and in what manner the “thing demised” shall be managed. It shall be taken in kind, like a Covenant from a Tenant of Land, not to sell straw or dung, or lop trees, or to make ditches or trenches, or do, or omit to do, any other Act respecting the Cultivation of the thing demised; and it is both within the Rule, and indeed the Words, of Lord Coke, in the second branch of what he lays down in Spencer’s Case: it touches and concerns “the thing demised” most essentially; it extends to the supportation of it; for by commanding the Tithes to be taken in kind, it averts and protects it against its most mortal enemy, a unity of Possession. Assigns are expressly named; and here is a Reversion in the Lessor, and therefore a Privity; and Lord Coke says, “the Assigns are not bound in a Lease of mere Personalty, because there is no Privity, as there is in the Case of Land, in respect of the Reversion.”

Land

Land and Tithe are the same. This Covenant may be compared to Covenants in Leases not to assign.—Cases have been cited to shew these are collateral Covenants; and they certainly are so: and we admit the Authority of all those Cases, viz. Pennant's Case, 3 Coke, 64. Styles, 265. Collins v. Sillye,—collateral. Moor, 243. Godbolt, 120. James v. Blunch. The word "Assigns" is not in the Covenant. They do not concern or touch the "thing demised;" they are as collateral as to deliver a horse, or pay a sum in gross. Hardres, 88.—A mere Personalty, no Privity.

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But this is a Covenant of a very different nature and import: a Covenant "not to assign," has only for its object who shall occupy it; there is nothing to be done in the Land, nor upon it. Lord Coke. Pennant's Case; it may be contrived so secretly, that no body may know of it; it is collateral. But this Covenant has for its object, not "who" shall occupy, but "how" it shall be occupied; it is to enforce the Occupation as a Tithe; let it go where it will, it shall be enjoyed in the same form, plight, and condition, as it is delivered to the Lessee: the Covenant leaves it quite open, and as a matter of total indifference "who" the occupier is, provided it is occupied as a Tithe, and taken in kind: for the Covenant, not to let the Farmers have the Tithe, is nothing more nor less than a Covenant that they shall be taken in kind; for they must be taken in kind, if the Farmers themselves are not to have them. In another respect it is totally different; the Covenant, not to assign generally, must be quite personal and collateral; for it can only affect the Lessee himself, and is so far from being meant to reach the Assigns, that it is inserted to prevent there ever being any Assigns at all: whereas this Lease grants the Tithes to the Lessee, his Executors, Administrators, and Assigns;
and

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and the Covenant is only to keep them in "esse," and in that separate state of existence, which they would lose by being blended and confounded with the other nine parts in the hands of the Farmers; and though I admit a Covenant "not to assign generally" is collateral, and collateral Covenants, not relating to the thing demised, do not bind the Assignee; yet no Case has been cited, that a Covenant for Lessee and his Assigns, not to assign to a "particular person," would not bind him; and I think it would, for it falls within every Rule laid down by Lord Coke, in *Spencer's Case*. A Covenant to do any thing upon Land, "de novo," as to build, though a collateral Covenant, binds Assignees, if named, and will not bind them, unless named; so here, it relates to the Thing, Assigns are named, and there is Privity; but this Covenant is more, because it is the Guardian of the Thing demised.

Suppose, in a Lease of Land, a Covenant for Assigns to set out the Tithes in kind, without making any Composition or Agreement for them with the Parson or Impropiator; this would be a proper Covenant, where part is exempt and part not, to prevent an application of Payment to the whole: Would it not bind the Assignee, as a Regulation of the manner in which he would have his Farm enjoyed? This is nothing more than that Covenant inverted: the one is, "you shall not give money;" this is, "you shall not take it." The Case put is, "you shall pay it in kind;" the present Case is, "you shall receive it in kind."

It was said, that by the Assignment to a Person, not within the Restriction, it was totally vanished; and *Cro. Jac. 398. Whitchcot v. Fox*, was cited to prove, that if there was a Covenant not to alien, except to a Brother, and an Alienation was made to a Brother, the Brother might alien to any body else. This is rather a strong Case,

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and certainly repugnant to the Intention of the Parties, which was to keep the Estate in the Family of the Lessee: but admitting that Case to be Law, yet it does not apply; for the Brother being totally excepted, he takes the Assignment exactly in the same manner as if there had been no Covenant at all: whereas the Covenant here does not restrain the Assignment, with an exception of any particular Person, but leaves it open to an Assignment by all, subject to such Terms as affects the very vital principle of the "Thing let" in the hands of the Lessee himself.

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In the Case put, the Covenant did not affect the right of assigning to a Brother in the hands of the Lessee: therefore it could not affect it in the hands of his Assignee: but this Covenant bound the Lessee; and for the Reasons and upon the Distinctions mentioned, it binds the Defendant, his Assignee.

We do not think it a mere collateral Covenant, unconnected with the Tithe; but a Covenant materially and essentially tending to preserve the "Thing demised," and as such, obligatory on the Assignee, and therefore there must be

JUDGMENT FOR THE PLAINTIFF.

IN THE COMMON PLEAS.

FROGMORTON, on the Demise of ROBINSON, against WHARREY.

1770.
Frogmorton
against
Wharrey.
V. 2. Black-
stone, 728.

THIS was a Special Case in an Action of Trespass and Ejectment, wherein the Plaintiff Declared for one Messuage, one Cottage, twenty acres of Land, twenty acres of Meadow, and twenty acres of Pasture, with the appurtenances, in Hemingbrough otherwise Hembrough, in the County of York.

To this Declaration the Defendant pleaded the general Issue, and thereupon Issue was joined.

The Cause came on to be tried at the Assizes held for the County of York, before the Honourable Mr. Justice GOULD; when it appeared in Evidence, as follows; that

JOHN ROBINSON being seised in Fee, according to the Custom of the Manor of Hemingbrough, of the Premises in Question, which were Copyhold, held of the said Manor, on the 1st day of August 1720, surrendered the same, according to the custom of the said Manor, to the use of MARY ARNALL (whom he then intended to marry) and the Heirs of their two Bodies lawfully to be begotten; and for default of such Issue, to the use of the right Heirs of the said JOHN ROBINSON.

The said Marriage took effect; and afterwards, to wit, at a Court held for the said Manor on the 21st Day of October 1720, the said

MARY

MARY was admitted Tenant to the said Premises, according to the said Surrender, to the use of the said MARY, and the Heirs of their two Bodies, lawfully to be begotten; and for default of such Issue, to the use and behoof of the right Heirs of the said JOHN ROBINSON, according to the Custom of the said Manor.

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The said MARY died in 1735, leaving JOHN, her eldest Son, begotten by the said JOHN ROBINSON, her Husband, which Son was born in the year 1722.

That the said JOHN ROBINSON, the Son, died in 1745, leaving the Lessor of the Plaintiff, his only Son and Heir, born in that year, who was duly admitted Tenant to the said Premises in the year 1769.

By the Custom of the said Manor, Husbands are entitled for Life to the Inheritance of their Wives, in the nature of Tenants by the Courtesy, whether the Wife is seised before the Coverture or afterwards.

JOHN ROBINSON, the Surrenderor, survived his Wife, and continued in possession till the year 1746, when he surrendered the Estate to the Defendant in Fee, who was admitted, and had been in Possession ever since; and the said JOHN ROBINSON, the Surrenderor, died in 1767.

The said JOHN ROBINSON, the Surrenderor, conceiving himself Tenant in Tail, under the Surrender, and admittance in 1720, did the proper Act to bar an Estate Tail, provided such Estate was vested in him, according to the Custom of the said Manor, previous to the Surrender to the Defendant WHARREY.

Whereupon a Verdict was given for the Plaintiff, subject to the Opinion of the Court on the following Question:

Whether the Plaintiff is entitled to recover or not?

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And after this Case had been twice argued, by Nares and Burland, Serjeants, for the Plaintiff, that this was an Estate Tail in the Wife; and by Jephson and Foster, Serjeants, for the Defendant, that this was an Estate for Life in the Wife, with a contingent Remainder to the Heirs of the two Bodies of her and her Husband;

Lord Chief Justice WILMOT delivered the unanimous Opinion of the Court:

IT is impossible to read this Case, without wishing to construe this Limitation in such a manner as to give it an effect in favour of the Lessor of the Plaintiff.

The Settlement was made before the Marriage, when a Provision for Children is the object of both the Parents care, but particularly the Mother's; and most probably they both thought ~~that~~ the Estate was effectually secured to the Issue of the Marriage, at all Events; or at least that the Issue could not be defeated but by their joint concurrence.

Unluckily for them, that could not be the consequence even if an Estate Tail had been vested by this Limitation in the Wife, 2 Syd. 73. Harrington v. Smith; for Copyholds, not being within the protection of the 11 Hen. VII. the Wife, surviving, might herself have defeated the Issue, and carried the Estate to the Issue of a second Husband; but if that legal Right would have accompanied such a Limitation, it would certainly have come nearer the Intention of the Settlement, to give the Wife an Estate Tail, though attended with a Power of barring, if she survived, than to give the Limitation to
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the Issue, which would have had no effect at all in case she died before her Husband; and therefore, we have most anxiously endeavoured to discover some solid ground to stand upon, for the giving an existence to this Limitation, after the death of the Wife, in favour of the Issue; but the Words and the Authorities are too strong for us, and it seems to me to be one of those Cases where we cannot do as we wish, without bending the Law more than we ought.

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And there is one decisive reason against straining the words to give an Estate Tail, arising from the frame of the Surrender. For it must be considered as it stood originally, the instant after it was made; neither the Marriage, nor any subsequent event, can vary the construction of it; and if the Marriage had never taken place, the Wife would have taken the same quantity of Estate, as she had after the Marriage; and, whatever might have been done in a Court of Equity, a Court of Law could not have controuled the legal operation of the Surrender.

The common Law, out of that tender regard which, in a variety of Cases, it shews for the female Sex, has provided a Writ, "*Causa Matrimonii prælocuti*," to fetch back again an Estate, made in contemplation of Marriage, where it has not taken place; but no such Redress is given to a Man. Co. Lit. 204. And then see what would be the consequence of giving the Wife an Estate in special Tail, by construing these words to relate only to the Heirs of her body by JOHN ROBINSON to be begotten; she might have barred the Reversion in JOHN ROBINSON, and acquired the whole Inheritance of the Estate, even in the life-time of the Surrenderor; whereas, by considering these words not as words of Limitation, but as descriptive of the Person to take, and as words of Purchase, she could not defeat the

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the Surrenderor; but when she had died, the contingent Remainder could not have taken place, and the Reversion in Fee would have fallen into possession: for we take the Case in 1 Leo. 101. Allen and Palmer, not to be Law; and that the Reversion remains in the Surrenderor, as in the Case of a Conveyance of a Freehold Estate, either at the common Law, or upon the Statute of Uses. Co. Lit. 22. 6: Fenwicke and Mitford's Case. Surrender of Copyhold, and Grant of Freehold, must have the same legal Operation.

This would certainly have been the consequence of giving the Estate in special Tail to the Wife, on the event of her not having married the Surrenderor; and though that was certainly not an Event then in their contemplation, but a subsequent Marriage; yet we must consider the Surrender, and construe it in the same manner as if that Event had happened, and the Case now before us upon that Event.

It has been very properly urged at the Bar, that the Will of the Donor is to be attended to in creating Estates Tail; and that the Intention must be effectuated if possible: but this Will and Intention must be taken from the words of the Deed.—What are the Words? “To the Heirs of their two bodies lawfully begotten, and for default of such Issue, to the use of the right Heir of the said JOHN ROBINSON;” that is, that nobody shall take this Estate, but who is the Heir of the Body of the Husband as well as of the Wife. Is the eldest Son of the Body of the Wife, the Heir of the Body of the Husband whilst he is living? Certainly not. And therefore, supposing it an Estate Tail, qualified and restrained, like the Case put in Page and Hayward, 2 Salk. 570. of an Estate limited to A. and the Heirs of her Body begotten by a “Searle,” or by any particular person of the name of “Searle,” the Heir of the

the Body of the Wife is not so qualified; unless the other part of the Qualification meets, or is found in the Heir of her Body, viz. "Heir also of the Body of the Husband," the Qualification is not complete, the description is not answered. He has only one part of the Character which the Donor has required; and though it is said, we may construe these words, "Heirs of their Bodies," to mean "Heirs of the Body of the Wife by the Husband begotten," and then the Limitation in the Event that hath happened will take place,—I say subsequent Events are not to influence the construction of the Words. What Authority have we to controul the plain obvious signification and import of these Words? We might be equally warranted to turn them the other way, and to say, "Heirs of the Body of the Husband begotten on the Body of the Wife," as "Heirs of the Body of the Wife begotten by the Husband." When Words are doubtful, we may decide the Doubt in favour of apparent Intention: but, when Words are clear, plain, and express, and have a proper Operation to check such a consequence as I have mentioned, in case the Marriage had not taken effect at all, we can neither go on one side nor the other; but must consider them according to their obvious import, and as describing the "Heirs of both their Bodies, without inclining more to one than the other: and let the legal consequences of that Construction be what they will, we cannot help it. The owner has said, "no child shall have this Estate after my Wife's death, if I am living, for no children can be Heirs of my Body, whilst I live." But whether he saw that legal consequence or not, we cannot controul the Rule of Law, "nemo est hæres viventis," without shaking Property to its foundations.

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It is not at all improbable, but he thought the Limitation might wait, and not execute in any body till he died, as he was to be Tenant of it by the Courtesy; or he might think it as right to leave the Issue in his power, if he survived, as to put them into his Wife's power, if she survived: but whatever their Intentions were (which is matter of conjecture) we must not reject one part of the description, and construe the words to mean "Heirs of her Body only," when the Donor has said, he gives it to ~~the~~ "Heirs of the Bodies of both;" and they may be different Persons. For suppose two Sons at the death of the Wife, the eldest dies without Issue, in the life of the Father; then the Father dies, the youngest Son is the Heir of the Body of the Father, and the Mother also; the eldest Son, at the death of the Mother, has one part of the description; the youngest, at the death of the Father, has both. But we do not think it a "qualified Estate Tail," or that any Estate Tail is vested by these words in the Wife, because no such Estate, as is here described, can descend from her. Where an Estate is limited to Husband and Wife, and the Heirs of their two Bodies, there is an Estate Tail vested in the Husband, which descends. But when the Estate is limited to the Wife, and the Heirs of the Bodies of the Husband and Wife, the Heirs of the Body of the Husband cannot be words of Limitation; because there is no precedent Estate given to be limited, and then these words, "Heirs of the Body of the Husband," must be words of Purchase: as if an Estate was given to a Woman and the Heirs of the Body of the Husband, on the Wife to be begotten, they must be words of Purchase; because the words of Entail do not apply to the Wife. An Estate Tail cannot descend from her to the Heirs of the
Body

Body of another person: and therefore no such Estate can possibly be ingrafted upon her. They must be words of Purchase, or can have no Operation at all; and there is no difference made, as to the Operation of these words, by mixing or joining them with "the Heirs of the Body of the Wife," to whom an Estate is limited; for the description of the persons to take being intire, both qualities are necessary to centre in one and the same person.

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These Words, which would be words of Limitation, if applied solely to the Wife, must be turned into Words of Purchase when applied to both, or they can have no effect at all: The company they keep necessitates such a Construction, to give the Intention of the Grantor a chance of being effectuated.

The Case in Littleton, sect. 352. as put by Littleton in the first Editions, by which the common printed Editions should be corrected, plays great light upon the Question.

In the common Editions, the Case is put, that if a Feoffment be made upon Condition that the Feoffee shall give the Land to the Feoffor and his Wife, to have and to hold to them and to the Heirs of their two Bodies engendered, and for default of such Issue, Remainder to the Heirs of the Feoffor; if the Husband die before any Estate Tail is made, living the Wife, the Estate shall be made by the Feoffee, "cy pres;" that is, to the Wife for Life without impeachment of Waste, Remainder to the Heirs of the Body of her Husband "on her" begotten, Remainder to the right Heirs of the Husband. Now as stated here, it is limited to the Heirs of the Body of the Husband, "on the Wife begotten;" and as he was dead, it would be a vested Remainder, and might warrant the application of these words to one instead of both: but in the old Editions of Lettou and Mack-

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linia, and the Roan Edition (both of which my Brother Blackstone is in possession of) it is limited to the Heirs of the Body of her Husband "and her" engendered; not a vested Estate Tail, but a contingent Remainder to the Heirs of both their Bodies, as in this Case.

And the Cases in Dyer, 64. 99. in Lane and Pannell, 1 Rolles Rep. 238. 317. and 438. and in Goffage and Taylor, as stated by the Manuscript and the Record, are very material Authorities to shew that where a Limitation is to the Heirs of the Body of the Husband and Wife, and there is no Estate limited to the Husband, they do not give any Estate Tail to the Wife to whom an Estate is limited; but are words of Purchase (a); the only difference between those Cases and this is, that the Estate is there limited to the Wife for Life, in express words, and after her decease to the Heirs of the Body of the

(a) This Case is in Styles's Reports, 325, which, from a Manuscript of Lord Hale, in possession of Mr. Justice Bathurst, appears to have been first determined in Hil. 1651; and this accounts for some expressions of Chief Justice Rolle, in the Case in Styles, which was in Pasch. 1652.

The Case, in the Manuscript, is:

That Sir Richard Frank levied a Fine of the Manor of Bottington, in Essex, to the use of himself during the joint lives of himself and his Son Leventhorpe Frank; and after the decease of either of them, to the use of Susan Cotell, for her Life, and after her decease, to the use of the Issue male of the said Susan and Leventhorpe, and in default of such Issue, to the use of the Heir to be begotten upon the Body of Susan by the said Leventhorpe; and in default of such Issue, to the use of the right Heir of the said Richard. The Marriage was had; Susan died, leaving five Daughters and no Son. Richard died, leaving Leventhorpe his Son and Heir, who is stated by the Special Verdict to be then living, and who entered and demised to the Defendant. The Plaintiff claims under a Demise from the Daughter. Resolved, 1st. If Husband Joint Tenant, an Estate Tail in both, v. Litt. Sec. 28. (a) 2d. That neither Husband nor Wife, had an Estate Tail; not Husband, because nothing is given to him; nor the Wife, because though she take an Estate for Life, yet the Heirs are not applied to her Body.

3d. That it is a contingent Remainder to the Heirs of both their Bodies:

Husband

(a) v. Har.
Co. Litt. p.
26. 2.

Husband and Wife begotten: whereas the Estate is limited here, to the Wife and the Heirs of their Bodies begotten: at first view, it looks more like an intentional contingency in one Case than the other; but upon legal principles they must have the same effect; for an Estate limited to A. for Life, and after his decease to the Heirs of his Body, have exactly the same legal operation as to A. and the Heirs of his Body; and therefore, if they will not give an Estate Tail to the first taker in one Case, they will not in the other; and the Reason applies equally to both,—no such Estate can be created; an Estate cannot be made to descend to the Heirs of the Body of a person who takes nothing; and therefore, when the Husband can take nothing, as in the Case put by Littleton, the Wife's Estate, which would here have been an Estate Tail, is turned into an Estate for Life, without Impeachment of Waste, with a contingent Remainder to their Issue. We are all therefore of Opinion that

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JUDGMENT of NONSUIT must be entered.

IN THE EXCHEQUER CHAMBER.

CATHARINE LOW, PLAINTIFF - - - - } IN ERROR.
 NEWSOME PEERS, DEFENDANT - - - - }

PLEAS in the Exchequer Chamber, at Westminster, before Sir JOHN EARDLEY WILMOT, Knight, Chief Justice of the Common Bench; Sir THOMAS PARKER, Knight, Chief Baron of the Exchequer; Sir EDWARD CLIVE, Knight, the Honourable HENRY BATHURST and Sir HENRY GOULD, Knight, the Three other Justices of the Common Bench; and also before Sir SYDNEY STAFFORD SMYTHE, Knight, Sir RICHARD ADAMS, Knight, and GEORGE PERROTT, Esquire, the Three other Barons of the Exchequer, on Monday the 14th day of November, in the ninth year of the reign of King George the Third, &c.

1770.
 Low against
 Peers.
 v. 4 Bur. 2225.

OUR Sovereign Lord the King hath sent to his right trusty and well beloved William Lord Mansfield, his Majesty's Chief Justice appointed to hold pleas before the King himself, his Writ closed in these words, (that is to say): George the Third, &c. To our right trusty and well-beloved William Lord Mansfield, our Chief Justice, appointed to hold Pleas before us, Greeting: Whereas by a Statute made, &c. the 23d November, in the 27th Elizabeth, late Queen of England, IT WAS by the Authority aforesaid (amongst others things) Enacted, that when any Judgment,

ment, at any time thereafter, should be given in the Court of King's Bench, in any Suit or Action of Debt, Detinue, Covenant, Account, Action upon the Case, Ejectment, or Trespass, first commenced or to be commenced there, other than such only where we should be a Party, the Plaintiff or the Defendant against whom such Judgment may be given, may at his Election sue forth out of the Court of Chancery, a special Writ of Error, to be devised in the said Court of Chancery, directed to the Chief Justice of the said Court of King's Bench for the time being, commanding him to Cause the Record, and all things touching the said Judgment, to be brought before the Justices of the Common Bench, and the Barons of the Exchequer, into the Exchequer Chamber; which said Justices of the Common Bench, and Barons of the Exchequer, or six of them at the least, by virtue of the said Act, shall thereupon have full Power and Authority to examine all such Errors as shall be assigned or found in or upon such Judgment, and thereupon to Reverse or Affirm the said Judgment as the Law shall require, other than for Errors to be assigned for or concerning the Jurisdiction of the said Court of King's Bench, or any want of any Form in any Writ, Return, Plaint, Bill, Declaration, or other Pleading, Process, Verdict, or Proceeding whatsoever; and that after the said Judgment shall be Affirmed or Reversed, the said Record and all things touching the same shall be removed and brought back into the said Court of King's Bench, that such further Proceedings may be made thereupon, as well for Execution as otherwise shall appertain, as in the said Statute is more fully contained: And forasmuch as in the Record and Process, as also in giving of Judgment, in a Plaint which was before us by a Bill, between CATHERINE LOW and NEWSOME PEERS, of a Plea of Breach of Covenant, as it is said, manifest

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manifest Error hath intervened, to the great Damage of the said CATHERINE, as by her Complaint we are informed, which said Error no ways toucheth us or the Jurisdiction of the said Court of King's Bench, or any want of Form in any Writ, Return, Plaint, Bill, Declaration, or other Pleading, Process, Verdict, or Proceeding whatsoever, as we are informed: WE therefore willing that the said Error (if any be) be duly amended, according to the form of the said Statute, and full and speedy Justice done to the said Parties in this behalf, DO command you, that if Judgment be given thereupon, you cause the Record and Process aforesaid, with all things touching the same, to come before our said Justices of the Common Bench, and Barons of our said Exchequer, into our said Exchequer Chamber, on Monday, the 14th day of November next ensuing, that the said Justices and Barons, viewing and examining the Record and Process aforesaid, may cause further to be done thereupon for amending the said Error as of right, and according to the form of the said Statute, shall be meet to be done. Witness ourself at Westminster, the 22d June, in the eighth year of our reign.

BROWNE.

[The Answer of William Lord MANSFIELD, Chief Justice within named:]

The Record and Process of the Plaintiff within mentioned, with all things touching the same, to the Justices and Barons within specified, at the day and place within contained, I certify, in a certain Schedule to the Writ annexed, as I am within commanded.

MANSFIELD.

PLEAS,

PLEAS, &c.

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CATHERINE LOW, complains of NEWSOME PEERS, of a Plea of a Breach of Covenant, for that WHEREAS, on the 25th July 1757, at London, in the Parish of Saint Mary-le Bow, &c. the Plaintiff, at the Defendant's request, agreed to marry him, and thereupon, and in Consideration thereof, the Defendant, by Deed of the 25th July 1757, promised the Plaintiff, that he would not marry with any Person besides herself, and if he should marry with any other Person, then he agreed to pay her one thousand pounds, within three months after his Marriage with any other Person; and that she hath remained sole and unmarried, and was always willing to marry the said NEWSOME, whilst he continued sole and unmarried; and that the said NEWSOME did on the 30th April 1767, marry another Person, namely, Elizabeth Gardiner, &c.; and that the said NEWSOME did not (though often requested) pay to the said CATHERINE the said one thousand pounds.

There was also another count to the following purport, viz.: And whereas also the said NEWSOME, on the said 25th July 1757, at London aforesaid, in the Parish, &c. aforesaid, being then also single and unmarried, by his certain other Deed, then and there made, and which said Deed, sealed with the Seal of the said NEWSOME, the said CATHERINE now brings here into Court, the Date whereof is the same day and year aforesaid, did promise to the said CATHERINE, she being then sole and unmarried, that he would not marry with any other Person besides herself, the said CATHERINE; and if he should marry with any other, then he by the said Deed, did agree to pay to her the said CATHERINE £. 1,000, within three months after such Marriage with any other Person: And the said CATHERINE in fact
saith,

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faith, that from the time of making of the said Deed, hitherto she hath remained and yet is sole and unmarried, and was always ready and willing to marry and take to Husband the said NEWSOME, whilst he continued sole and unmarried, whereof the said NEWSOME during all that time had Notice. And the said CATHERINE, further in fact faith, that the said NEWSOME did, after the making the said last-mentioned Deed (that is to say) on the 30th April 1767, marry another Person than the said CATHERINE, namely, one Elizabeth Gardiner, yet the said NEWSOME (although often requested) did not within three months after such Marriage, or at any other time, pay to the said CATHERINE £. 1,000, or any part thereof, but therein wholly failed and made default, contrary to the form and effect of the said Covenant of the said NEWSOME so made in that behalf as aforesaid; and so the said CATHERINE faith, that the said NEWSOME (although often requested) hath not kept with her the Covenant so made between them as aforesaid, but hath broken the same, and to keep the same with the said CATHERINE, he the said NEWSOME hath hitherto altogether refused, and still doth refuse; whereupon the said CATHERINE faith, she is injured, and hath sustained Damage to the value of £. 2,000, and therefore she brings Suit, &c.

To both which Counts the Defendant pleaded the General Issue, and thereupon Issue was joined.

This Cause being tried before Lord MANSFIELD, the Jury find that the said Writing in the said first Count of the said Declaration mentioned, is "not the Deed" of the said NEWSOME, mentioned in manner and form aforesaid, as the said NEWSOME hath in his said Plea within alledged; and the Jurors aforesaid, upon their Oath aforesaid, further say, that as to the second Issue within joined between

tween the Parties, the said Writing in the said second Count of the said Declaration mentioned, "is the Deed" of him the said NEW-SOME, as the said CATHERINE hath within alledged; and they assess the Damages of the said CATHERINE by reason of the Premises, besides her Costs and Charges by her laid out and expended about her suit in this behalf, to £. 1,000, and for those Costs and Charges to 40 s.

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This Judgment was afterwards arrested in the Court of King's Bench, from whence a Writ of Error was brought into the Exchequer Chamber; and after Argument,

Lord Chief Justice WILMOT delivered the unanimous Opinion of the Court. May 1770.

After stating the Proceedings, he said,

THERE are two Questions:

The 1st Question is, Whether a Covenant not to marry any Person but the Covenantee, under the Penalty of £. 1,000, without any Consideration whatever to support it, is valid in point of Law, and whether an Action will lie to recover the Penalty?

The Counsel at the Bar, who argued this Case for the Plaintiff with great ability, admitted that the Civil Law had a violent aversion to all restraints upon Marriage; and that the Court of Chancery followed the Rule of the Civil Law, in Cases where they exercised a concurrent Jurisdiction with Civil Law Courts; but contended that the Common Law had not adopted that aversion, and reprobated all restraints upon Matrimony, as the Civil Law did: and they mentioned the Case of Ecclesiastics, and Masters in Chancery formerly, and Fellows of Colleges; and that by particular Modes and Provi-

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fions Marriage may be checked ; as by limiting Estates while Grantees remain Sole and unmarried ; or agreeing to pay a Sum of Money upon Marriage, which will have the same effect as agreeing not to marry under a Penalty ; and this kind of reasoning was very skilfully introduced, in order to divide this Covenant ; and, supposing the first part of the Deed, not to marry, to be illegal, yet that the second part of it might operate as a Promise to pay £.1,000 upon Marriage, which is legal ; and many Cases were cited to shew the difference between Bonds void by Statute and at the Common Law ; and that one part of a Condition may be good and an Action maintainable for a breach of it, though another part is bad. It is not necessary to state or consider those Cases, for the fact does not warrant the Application of them, because this Deed contains an entire Agreement which must be taken altogether ; and there is not the least pretence to divide and separate it into distinct and different parts. The Penalty waits upon the Contract, and is to secure the performance of it. The Covenant is the Law, and the Penalty the Sanction of it ; and therefore the Question first put is the true Question, viz. “ whether a Covenant not to marry any body except the Covenantee under a Penalty,” induces such a valid legal Obligation, that the Courts of Common Law will sustain an Action for the breach of it ; and as there are no Cases directly in point, it may not be improper to mention the reasons particularly which determine us to think that this Covenant is void, and that no Court of Justice ought to entertain an Action for the violation of it.

Upon the first view of this Question, the Maxim, cited at the Bar, of “ *volenti non fit injuria*,” seems to favour such a Covenant : that every man has a right, “ *disponere de suo jure* ;” and as the Law
does

does not oblige any body to marry, but leaves a free Agency in that respect to every member of this Community, it is not an Agreement to omit what the Law commands ; but an Agreement to omit, what the Law leaves to every one's own choice to omit if he pleases. And so far as respects obedience to the positive Law of this kingdom, the Argument is unanswerable : but, besides legal Obligations, every member of Civil Society is under a variety of moral Obligations, which Municipal Laws do not enforce, but which the Law of Nature, which is the Law of God, calls upon him to perform. It would be endless to enumerate the Duties which are the objects of moral Obligations, both in a state of Society and out of it ; Gratitude, Charity, and all Parental and Filial Duties, beyond mere Maintenance ; Friendship, Beneficence in all its various branches, and many more, which might be named, are Duties of perpetual Obligation : and I cannot name a greater than Matrimony, being one of the first Commands given by God to Mankind after the Creation, repeated again after the Deluge, and ever since echoed, by the voice of Nature, to all Mankind. For the precept of Multiplication has been always expounded, by the civilized part of the World, to mean Multiplication by the medium of Matrimony, and not by promiscuous Copulation ; and there cannot be a Duty of greater importance to Society, because it not only strengthens, preserves, and perpetuates it, but the Peace, Order, and Decency of Society, depend upon protecting and encouraging it.

The point therefore to be considered, is, whether a Covenant to omit such a Duty, ought to be enforced " in foro civili."

The Writers upon the Law of Nature, consider Contracts, to omit such Duties, as void ; nay, they consider an Oath to perform them as not obligatory. Grotius, 2 Lib. cap. 13. sect. 67. " Ut valeat Jura-

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“ mentum, oportet Obligatio sit licita ; quare nullas vires habebit
 “ jurata Promissio de re illicita, aut naturaliter aut divina interdic-
 “ tione aut etiam humana ; * * * imo etiam si res quæ promittitur,
 “ non sit illicita, sed majus bonum morale impediens : sic quoque
 “ non valebit Jus-jurandum ; quia, scilicet profectum in bono, Deo
 “ debemus, ita ut ejus libertatem eripere nobis ipsis non valeamus.”

A Covenant of this kind does not only hinder a greater moral and social Good, it does not only interfere and check that “ Profectum in bono,” which we owe to God and our Country, but it tends to Evil and to the promoting of Licentiousness ; it tends to Depopulation, the greatest of all political Sins : it is a Contract, “ vergens ad publicam perniciem,” and therefore has a moral turpitude in it.

Will the Law of this Country, the perfection of human reason, enforce such a Contract ? Is a Covenant to omit moral Duties, which, for the exercise of our virtues, are left to our free choice, the proper Subject-matter of an Action ?

Laws are the Will of the whole Community, and one great part of their function is to enforce the performance of Contracts ; but could it even be the Will of any Community to give an effect to Agreements subversive of any moral or social Duty ; and, instead of meliorating and perfecting human nature, countenance and sanctify a Contract founded in the corruption and depravation of it ?

And it is much worse than a Covenant of perpetual Chastity, which extends to all unlawful as well as lawful intercourse : for this Covenant only interdicts the innocent gratification of a natural appetite, and leaves the Party at liberty to a criminal indulgence of it. To entertain an Action for the breach of such Contracts, would be setting the Laws of God and man at variance with one another : it would be
 making

making the Common Law counteract its own favourite dominant principle, "Salus populi suprema Lex."

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The increase of the People in such a commercial State as ours, where our foreign Dominions would take, often times, more than we have to send them, conduces most materially to the strength and prosperity, and consequently to the safety, of the People; and Reason, History, and Observation tell us, that such an Increase is best secured by the medium of Matrimony, which is therefore very truly called, the Seminary of Mankind.

Courts of Justice must execute the Laws as they find them; but if there is no positive written Law, nor any adjudged Cases, compelling them to apply their Power and Authority in support of such a Contract; as the Law stands neuter in respect of Matrimony, and many other moral Duties, and leaves it optional to Mankind whether they will perform them or not, we are for leaving the performance of Contracts to omit them equally optional.

It is sufficient that the Law leaves Matrimony to every man's free choice, and does not punish Celibacy: but to effectuate a Contract for the continuing in such a state, is totally inconsistent with the Ideas we have of the proper functions of a Court of Justice. Activity in such a Case, seems to be a profanation of Justice, and Neutrality the purest and most refined exertion of it.

I have dwelt a little upon this Argument, because Reasons drawn from States, where Marriage was a positive Duty by the Law of the State, do not apply to this Case, where it is not so: with the Jews, Greeks, and Romans it was; and therefore Contracts of this kind, with them, must be so far from being executed by them, that they must have been objects of Punishment: but we disclaim all Arguments from those
Laws,

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Laws, and therefore we mean to bottom this Judgment upon the Law of God, the principles of Reason, Morality, and the Common Law, independent of any other Municipal Law whatever.

I will consider how the Law of this Country treats Restraints upon Marriage; and though no Case can be found "in specie" upon this Question, yet a Principle is to be found, which directly applies to and governs it.

The Case of Ecclesiastics, whether Secular or Religious, was a weed of the Canon Law, erroneously tolerated by the Common Law, and totally extirpated at the Reformation.

The Case of the Six Clerks in Chancery, is recited by the Act to have been a Custom, not grounded upon any Law at all.

The Case of the Fellows of Colleges depends upon the Will of the Founder: there is a Succession in Colleges; it is only a temporary restraint on a few in Seminaries of Learning, which are not proper places for the reception of Wives and Children; and the loss which the Public receives from the Celibacy of a few, is most amply compensated to them by the better accommodating those Seminaries to the purposes of Education.

The Case of Customs of Manors, and Limitations of Estates during Celibacy, are modifications of Property; and though they do invite the Proprietors of such Estates to abstain from Matrimony, yet they do not profess and avow that Intention; as an Estate given upon Condition, or an express Agreement, not to marry under a Forfeiture, does; where it figures in the shape of a Penalty, and discloses a premeditated design to check it.

But whatsoever weight there may be in the Distinction between a Limitation and a Condition, it has been long settled and so often judicially

officially recognized, that it ought not now to be disturbed; and it is observable, that it is not a subtlety of our Law only, for the Civil Law, in the passage mentioned at the bar by Mr. Cuff, out of Swinburn, makes the same Distinction, and mentions the reason for it, which I have given 4th Part. Ch. 12. Sect. 6. 19.

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“ Moreover, if the Testator do bequeath any Legacy to a Woman conditionally, if she do not marry, willing her to restore the same to another, if she do marry: ~~albeit~~, in this Case, the Woman do marry, she may obtain the Legacy, neither is she bound to restore the same; unless it were the meaning of the Testator, not to forbid Marriage, but to grant the use of the thing bequeathed until the Legatary did marry.”

“ The ninth Limitation is, when the Prohibition of Marriage is not made conditionally by this word “if:” as “I make thee my Executor,” if “thou dost not marry,” but by other Words, or Adverbs of time; as when the Testator willeth that his Daughter, or Wife, shall be Executrix, or shall have the use of his goods,” so long “as she shall remain unmarried; agreeable hereunto are the Laws of this Realm of England, wherein there is a Case that one of the Kings of this Realm did grant to his Sister the Manor of D. so long as she should continue unmarried; and this was admitted to be a good Limitation in the Law, but not a Condition.” Edw. VI. to his Sister Mary, according to Hen. VIIIth’s Will (Dyer, 141.)

The Common Law, therefore, in allowing such Limitations, does not discover any more favour to Restraints upon Matrimony than the Civil Law did; both allowed a Modus as qualifying and limiting the duration of Property, but rejected a Condition.

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And it is called a "Modus" by the Writers upon that Law, in contradistinction to a Condition; and it was certainly considered, by both Laws, like any collateral determination of the Estate, or qualification of the Donation: but a Covenant, not to marry under a Penalty, stands totally unconnected with any Gift or Estate at all; and it is not "*lucrum cessans*," as in the case of a Limitation of an Estate, but "*damnum datum*" and Punishment. It is laying a Mulct upon himself for doing what ancient Policy mulcted him for not doing; the Case put, of a Note to pay a sum of Money upon Marriage, is, upon the face of the Note, only a contingent time of Payment. Some Consideration must be proved, and if, under the pretence and mask of a fictitious Consideration, it should appear to be given as a Penalty to restrict the giver of the Note from marrying, without any reasonable ground, foundation, or Consideration for giving it; I should be apt to say as Papinian did, "*quod in fraudem legis, ad impediendas nuptias adscriptum est, nullam vim habet.*"

D. xxxv. de
Condit. &
Demos. § 79.

A Case was cited out of 1 Rolles Abridg. 418. that if a man leases for life, upon Condition that if the Lessee shall marry without Licence he shall re-enter, it is a good Condition. The Case is taken out of the Year Book of 43 Edward III. 6. a. The Case itself is upon a Custom to pay a Fine by the Tenants of a Manor, holding in Villenage, on the Marriage of their Daughters, and an Issue was taken on the Custom: but the passage cited, and turned into Rolles, is only, in the Year Book, a dictum of Kirton, a Judge; and he adds, "yet it is a Condition against the Common Law;" so that, as far as it goes, it is an Authority in point, condemning such Restraints. Baker and White, 2 Ver. 215. A Bond from a Widow, not to marry again, was decreed

decreed to be delivered up, though there was a counter-Bond to pay a Sum of Money to her Executors, if she did not.

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All the Cases cited out of the Books, where devises of either real or personal Estate, made "upon Condition of not marrying without consent, with a Devise over on non-performance of the Condition," are held to be good, are so far from being Prohibitions of Marriage, that they contemplate and have a Marriage in their view, under a proper direction; and though the liberty of Marriage is to be favoured, yet the liberty of disposing of Property as the Owner pleases, is likewise to be supported; and by considering these Provisions in Deeds or Wills, not as Prohibitions, but as wise Regulations of Marriage, parental Authority, and a free exertion of the rights which property gives, are duly maintained, 1 Mod. 308.; and the Reason given by Hale, for supporting such conditional Limitations, is, "because the Party is not thereby bound from Marriage." In the Case of Harvey and Aston, Comyns Chief Baron, 729. lays it down, "if a Portion be given, on Consideration that a Daughter should never marry, it should be rejected as repugnant to the original institution of the Creation of Mankind;" and a Covenant, not to marry any body except a person who is not obliged to marry, is to every purpose the same as a general Restraint; and then the principle of public Utility interposes, and forbids the sustaining an Action for the infraction of it; and what is said in 2 Shower, 351, The Company of Taylors against Clarke, seems to be the substance of every thing which can be said on this subject, viz.

"Whatsoever a man may lawfully forbear, that he may oblige himself against; except where a third Person is wronged, or the Public is prejudiced by it."

3 C

But

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Peers.

But the principle of the Judgments upon Bonds to restrain Trade generally, or in a particular place, without Consideration, directly applies to the Case and rules it; for every man is at liberty to follow his trade or let it alone. He cannot be compelled to follow it: he may be obliged to maintain himself, if able, but quite at liberty as to the Trade or Employment, or kind of Labour.

Mitchell and Reynolds, 1 Peere Will. 181. where the Restraint is confined to a particular Place, for a particular Time, and upon Consideration, the Bond was held good, because the interest of the Public is not at all concerned. The indignation of a Judge in Hen. Vth's. time (a), at such a Bond, shewed it was criminal in his apprehension. And surely the interest of the Country is more materially concerned, and more fatally affected by this Covenant than by the other.

(a) Vide Mr.
Cox's Note,
1 Peere. Will.
p. 193.

I see great temptations to Contracts of this kind, and the danger of an abusive application of them. Many virtuous young Ladies, from filial Duty, from a regard to their Parents, from their dependency upon them, and expectations of Fortunes from them, may not choose to enter into Contracts of Marriage. Young Gentlemen, in the hands of cunning artful Women, may have firmness enough to resist Promises of Marriage; but both Ladies and Gentlemen, when pressed to marry, and apprehensions are expressed of their marrying some other, may, and frequently are, induced to promise, not to marry any other Persons but the objects of their present Passion; and if the Law should not rescind such Engagements, they would become Prisoners for life, at the will of most inexorable Jailors,—disappointed Lovers.

It is the duty of all Courts of Justice to keep their eye steadily upon the interest of the Public, even in the Administration of commutative Justice; and when they find an Action is founded upon a

Claim injurious to the Public, and which has a bad tendency, to give it no countenance or assistance in "foro civili." Upon this principle, turning Prosecutions for Felony into Civil Actions for the things stolen, Bonds and Agreements not to prosecute Felonies; and many other Cases might be cited, which are all governed by that super-eminent and noble Principle, the Care and Protection of the whole Community. And upon that Principle, we think this Covenant, not to marry, unsupported by any Consideration, is void.

Low against
Peers.

The 2d Question is, Whether there is any Consideration, appearing upon the face of the Deed; or any foundation for presuming such a Consideration, as will substantiate this Covenant, and give a binding property to it?

It was contended, that a Covenant to marry no other person but the Plaintiff, was a Covenant to marry the Plaintiff, and that it was no more than what was implied in every Marriage Contract: and it is certain, that a Covenant to marry the Covenantee, doth carry along with it a Covenant not to marry any one else, "expressio unius est exclusio alterius;" but the converse of the Proposition is not true; for a promise to marry no Person but the Covenantee, is not a promise to marry the Covenantee. It is not a Negative pregnant of an Affirmative Promise, but it is a mere Exception out of a Restraint, which would otherwise have been general; and if the Person excepted had been a Stranger, and not the Covenantee, there could not have been a shadow of doubt upon the Construction, and yet the Exception must have the same effect in both; and though it was very properly argued, that Deeds are to be construed according to the Intention of the Parties, yet that Intention must not be the child of Fancy and Conjecture, but be collected from the Deed itself.

Low against
Peers.

We are to construe Contracts, which have been made, liberally, to reach the intention of the contracting Parties; but we are not to twist and turn Exceptions out of Contracts into Contracts, and make Agreements for Parties, which they have not made for themselves.

It has been said, that if it is not a Promise to marry her, it is a delusive Promise, and the Plaintiff is cheated, because she must have considered it as a Promise to marry her. I see no delusion at all in it: the Words are plain and clear, and it is a decisive Evidence to me, that the Plaintiff did not mean to take, nor the Defendant to give, a Promise of Marriage; because, if they had had any such meaning, they would explicitly have said so. Why take such a Circuit to express what five Words would have expressed? Why substitute the Effect and consequence of a Promise of Marriage, in the place of the express Promise itself?

Reciprocal Promises of Marriage were not their intention; but a most unequal Agreement, by which the Man is to be bound, and the Woman to be left in a state of perfect liberty as she was before. I am now speaking of the Agreement as meant and understood by the Parties; for however the Law may, for very wise purposes, controul such an Agreement, yet, taking it as they understood it, the imposition is upon the Defendant, and not upon the Plaintiff; for she is left quite a free Agent, and may marry whom she pleases with impunity; and at the same time, the Defendant, can marry nobody but her, without paying her £. 1,000. She walks through life with him as a Captive in her hand.

He could maintain no Action against her on this Deed, for not marrying him. In "assumpsit," mutual Promises must be proved; if by Deed, they must be contained in the Deed.

It

It was argued, that if the Defendant PEERS had tendered himself in marriage to the Plaintiff, and she had refused, that it would have been a Discharge, or at least sufficient to excuse the Non-performance of the Covenant; and two Cases were cited, Holcroft and Dickenson, Carter, 233. and Cross and Hunt, Carthew, 99. In these Cases there were mutual Promises of Marriage; but in this Case there are no mutual Promises of Marriage, and therefore a Tender and Refusal in this Case, where she was not obliged to marry him, and he was not obliged to marry her, could not operate in Avoidance of his Covenant, nor as an excuse for the Non-performance of it: but if there were any doubt, the Plaintiff herself hath resolved it; for in the Count upon which she has recovered, she only says, she was ready and willing to have married the Defendant, of which he had notice; but does not declare upon the Deed, as containing any intrinsic Promise of that kind, or as founded upon any extrinsic Promise of Marriage from her. She considers, and declares upon, the Deed, according to its natural, obvious signification, that is, a Covenant not to marry any other Person but her, without an intimation of any other Covenant whatsoever in the Deed.

Low against
Peers.

If there was no Covenant to be found in the Deed from the Defendant to marry her, nor any Covenant from the Plaintiff to marry the Defendant, or even not to marry any other Person; the Question then is, whether a Consideration to support a void Deed is to be presumed, or, if it is not to be averred and proved? It was argued, and Plowden, 308. cited, that the Law, from the deliberation and solemnity which accompanies the Execution of a Deed, presumes the Consideration, and delivers the Obligee from the necessity of proving it, which must be done in Actions upon simple Contracts: that Doctrine

is

Low against
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is right, but it applies only to Cases where the Deed is good upon the face of it. There the will of the Party, who makes the Deed, is a sufficient Consideration; as Plowden says, “because Promises by Words, and parole Contracts, escape often from men lightly, easily, and without much attention and deliberation, the Law has provided that they shall not bind, unless there is a Consideration.” The will of the maker of the Deed shall be a decisive Evidence of the will of the Party who executes it; but if that will encounters the Interest of the Public, the Deed is condemned, not because the Deed doth not evidence the will of the Maker, but because it evidences a will which the Law controuls and condemns; and I know of no Principle or Case, where a Consideration has been presumed to support a Deed which is void upon the face of it. The apparent Consideration must be taken to be the only Consideration, till the contrary is proved. If a presumption of Consideration, without Proof, was admissible, no Deed could be condemned for its apparent illegality.

But it was argued, that the Defendant, to oust the presumption of a Promise from the Plaintiff to marry the Defendant, should have pleaded there was no Promise of Marriage from the Plaintiff, and tendered an Issue upon it.

If the Deed had been good upon the face of it, it would have been incumbent upon the Defendant to have pleaded the Fact which had avoided it; but it is contrary to all Rules of Pleading and common Sense, for the Defendant to introduce a Fact to support the Plaintiff's defective Declaration.

If such a Deed is to be propped and bolstered up by Averments, it is incumbent upon the Party, who would support the Deed, to make them, and not upon the Defendant who contends to avoid it: And

a Plea

a Plea offering an Issue, that there was no such Promise, would be bad, because it would be traversing a Fact which is not alledged.

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Peers.

But it is objected there is a Fact alledged in the Declaration, which might have been traversed, and not being traversed; must be taken to be true, and that the Deed is legitimated by it; viz. "That she was always ready and willing to marry and take the Defendant to Husband, whilst he continued unmarried;" but the Plaintiff being ready and willing to marry the Defendant, (supposing it to be a traversable matter,) will not have a retrospective influence, and vary the nature of the Covenant in its original creation.

If it were void when executed, no subsequent Consideration can animate it, and give it a legal existence; for the Plaintiff being ready and willing to marry the Defendant, does not prove a Promise to marry him anterior to the Deed, or concomitant with it, which is the point and gist of this Question; and therefore admitting that Fact to be true, nay, admitting it was a subsequent Promise to marry him, it cannot give a being to the original Deed.

But it is said, the Plaintiff's Acceptance of the Deed, is an evidence of a Counter-promise; and that, in practice, out of regard to the modesty of the Sex, a very little, perhaps silence alone, is sufficient to prove the Woman's Assent; but in those Cases, a Promise of Marriage on the Man's side is fully proved; and so is the Case of Cross and Hunt in Carthew; there was an Acknowledgment under his hand; whereas here is no Promise of Marriage on the Man's side at all, and therefore it would be most absurd to presume a Counter-promise, where there is no Promise on the other side: and the Acceptance is really nothing more than evidence of assent to the Terms expressed in that Deed; and if there had been any similar Deed containing

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taining a Covenant from the Plaintiff, “*ejusdem generis*” with the Covenant upon which this Action is founded, it ought to have been averred and proved; and without such a mutual Obligation, as Lord Hardwicke said in *Woodhouse and Shipley*, 2 Atk. 535. there is no colour to support it; and we are no more at liberty to presume a good Consideration to support a Deed, void upon the face of it, than to presume a bad Consideration, to shew the nullity of the Deed that is good upon the face of it; they must be equally introduced by Averment, and proved in both. In the Case of *Cheefman and Nainby*, 2 Lord Raymond, 1456. 2 Strange, 739. the Bond was held to be good, because being only to restrain Trade in a particular Place, and for a valuable Consideration appearing upon the face of the Bond; but if that had not appeared, and it had not been averred, it had been void; for a Bond to restrain in a particular Place, without Consideration, is equally bad with a Bond of general Restraint; and if this were a Case of Presumption, which it is not, the Record in this Case absolutely forbids any Presumption of a Promise of Marriage by the Plaintiff; for upon the first Count, which states the Plaintiff’s Promise of Marriage to the Defendant, as the Consideration of a Deed, “*in totidem verbis*,” the Jury have found for the Defendant; so that it appears judicially to us, that there was no such Promise as we are now desired to presume; and therefore the Verdict is so far from furnishing any Presumption of such a Proof, that it is decisive against such a Presumption: but if the Count, on which the Verdict is taken, had been the only Count in the Declaration, there would have been no foundation, from the Verdict, to presume that such a Consideration was proved: for the extrinsic collateral Consideration, not being alleged, could not have been given in Evidence in this Count, and therefore

therefore the Verdict, confining it to this Count only, can furnish no such Intendment.

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The Plaintiff was apprized of the Defect, and therefore laid the Promise of Marriage in the first Count, but was not able to prove it. But as the two Counts are to be considered distinctly, and as if there had been two distinct Deeds, we lay no great stress on the Verdict upon the first Count.

As the Deed is void on the face of it, and there is no intrinsic Consideration, nor any alledged in the second Count; We are all unanimously of Opinion, that the Judgment is right, and must be Affirmed, and therefore

Let it be AFFIRMED.

I N C H A N C E R Y.

The Great Seal in Commiffion.

L O R D S C O M M I S S I O N E R S,

Lord Chief Juftice WILLES.

Sir SYDNEY STAFFORD SMYTHE.

Sir JOHN EARDLEY WILMOT.

GEORGE SAYER, Doctor in Divinity - - - - - PLAINTIFF.

WILLIAM MASTERMAN and ELIZABETH SAYER, an
Infant, by her Guardian - - - - - DEFENDANT.

June 1757.
Sayer against
Masterman.
Vide Ambler
344.

THIS (*a*) was a Bill brought by the Plaintiff to compel the Defendant to complete a Purchase pursuant to Articles entered into for that purpose. The Defendant submitted to perform this Agreement, provided a good Title could be made to the Lands in question by the Plaintiff; and it came before the Court on this Case.

EXTON SAYER, being seised in Fee, by Will, dated 26th of October 1730, all of his own hand-writing, devised, inter alia, as follows, viz. "In case I die not leaving Issue, I do further give and de-

(*a*) This is the only Case in this Volume, which is not printed from Sir Eardley's own Notes; but being a Case of importance, and not fully reported in Ambler, it is inserted here.

" wife,

“ wife, after the death of my Wife, all my Estates or Farms at Tolby,
 “ Stapleton, and Pepperfield, in the County of York, to my Brother
 “ EVERARD SAYER, during the term of his natural life, with a
 “ power for my said Brother to make a Jointure on any woman he
 “ shall marry: and after his decease, to such Child or Children as shall
 “ lawfully be begotten by him, the Males however to be preferred
 “ before the Females, and they to succeed according to their Births:
 “ and in Trust to preserve Contingent Remainders from being de-
 “ stroyed during the Life of the said EVERARD SAYER, I do give
 “ the said Estates and Farms to my Friend Dr. THOMAS RUNDLE:
 “ and after the decease of my said Brother, and on failure of Issue as
 “ aforesaid, I do give the said several Estates and Farms to my Bro-
 “ ther GEORGE SAYER, and the Heirs of his Body, the Males hav-
 “ ing preference as aforesaid, and succeeding according to their
 “ Births: and to preserve the Contingent Remainders from being
 “ barred during the Life of the said GEORGE, I give the same to
 “ the said Dr. RUNDLE: and on failure of Issue of the said GEORGE
 “ SAYER, I give the said Estates and Farms to my Niece MARY
 “ CRISP, and the Heirs of her Body; and on failure of Issue of the
 “ said MARY CRISP, Remainder to my own right Heirs: And after,
 “ I devise to my Brother GEORGE SAYER, all my Estate, &c. at D.
 “ whether Leasehold, Copyhold, or Freehold, not before devised,
 “ during the term of his natural Life, and to the Heirs of his Body,
 “ the Males having preference according to their respective Births;
 “ and to preserve the Contingent Remainders from being defeated
 “ during the Life of the said GEORGE, I give the same to Dr. RUNDLE
 “ in Trust; and on failure of Issue of the said GEORGE, I give to my
 “ Brother EVERARD SAYER the same, and to the Heirs of his Body,

Sayer against
Maiterman.

Sayer against
Masterman.

“ in order and preference aforesaid, with a power to make a Jointure
“ and Leases for twenty-one years, at the usual Rent, to GEORGE
“ and EVERARD respectively; and to preserve the Contingent Re-
“ mainders from being defeated, I likewise give the same to the said
“ Dr. RUNDLE, during the Life of my said Brother EVERARD; and
“ after his decease, without Issue, the Remainder to MARY CRISP,
“ and the Heirs of her Body,” Remainder in Fee to the right Heirs
of the Testator.

There was this Clause in the Will, “ my Pictures to my said Brother GEORGE the use of, during his Life, and after his decease, in the manner as it is entailed above.”

EVERARD SAYER died in 1731, without Issue; Dr. THOMAS RUNDLE was also deceased, and MARY CRISP was dead without Issue; GEORGE SAYER articted for the sale of the Estate included in the first Devise; and the Question was, whether by the words of this Will, GEORGE SAYER took an Estate for Life or in Tail.

Mr. WILBRAHAM and Mr. CLARK argued for Plaintiff, that this was an Estate Tail. That this Devise was of a legal Estate, and in proper technical words, “ Heirs of the Body,” which always carry an Estate Tail. That the Testator’s Intention must be agreeable to the Rules of Law; and though he may design to give only an Estate for Life, yet if the words will carry an Estate Tail, the Court will put that construction upon them, as in the Case of Atkyns and Atkyns, Cro. Eliz. 248. which was a Devise to S. and the Heirs of his Body, and after his decease to B. the elder Son of S. and the Heirs of his Body, Remainder over. It was there argued that S. had an Estate for Life, Remainder to B. as a Purchaser; but it was held he had an Estate Tail, for by the first words an express Estate Tail was given him,

him, and there are no special words to correct or alter them, and this seems to be a Case in point.

Sayer against
Masterman.

That there was a great difference between Estates executory and executed; and that Authorities drawn from Devises of Trust Estates, ought to have no weight in the present Case. That there was a great difference in wording the Devises to EVERARD and GEORGE, for there was a power to make a Jointure given to EVERARD, but not to GEORGE; and there was great reason to make the distinction, the one being an Estate in Possession, the other in Remainder; and where an Estate for Life only was given, a power to make a Jointure was properly given; where an Estate Tail was intended, there was no necessity for it; that the words being different, the Testator must necessarily have had a different meaning; and this was the ground of Lord Hale's determination in King and Melling, 1st Vent. 214. 225. That the Limitation being to Dr. RUNDLE for the Life only of GEORGE, and he being dead, there was an end of his Estate, which would be subject to Occupancy, and could not go in Succession: that the power to make a Jointure or Leases, could not restrain this to an Estate for Life, according to King and Melling; nor the insertion of Trustees to preserve Contingent Remainders. Bale and Coleman, 1 Peere Will. 142. That a Devise to one for Life, and after his decease to his Children, if he has no Children living at the time, is an Estate Tail. Ellen and Alcock, 2 Freeman's Reports, 186. Sondag's Case, 9 Co. 127. That there being an express Estate Tail devised, it ought not to be controuled by doubtful subsequent words.

Mr. Attorney and Mr. Solicitor General argued, That this was only an Estate for Life in GEORGE SAYER; that the principal rule in the construction of Wills, was to find out the Testator's Intention; that
if

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Masterman.

if the Testator's Intention appear certain and manifest, the Court will give it effect, notwithstanding any inaccuracy of expression; and for this was cited the Case of Counden and Clark. Hob. 29. Cole and Rawlinson, Salk. 234. As to the Case of Atkyns and Atkyns, Cro. Eliz. 248. it does not prove the contrary; for there was no clear and certain Intention appearing, and therefore where there was ambiguity and doubt, the Law must take place. That if this stood merely upon the Devise to GEORGE SAYER himself, there would be no difficulty, because it is expressed in proper technical words; but we are to consider whether there is not any thing in any other parts of the Will to shew the Testator intended him an Estate for Life only; for all the words must have a meaning, if they are capable of having a construction upon them. To give GEORGE SAYER an Estate Tail, you must entirely reject the Devise to Dr. RUNDLE, to preserve Contingent Remainders, and these words must have no meaning at all, and this would be contrary to a principal rule of construction. In so serious an act as making a Will, and where the same is all of the Testator's writing, it cannot be supposed he would make use of any words without having an idea annexed to them. They rely on the words to GEORGE SAYER, and the Heirs of his Body; but these are not all the words; his Intent can never be collected from part only, and the sentence is not completed till after the limitation to Dr. RUNDLE; and the rule of construction is, to take the whole of the Instrument together, and not to collect the meaning from any particular part; that the Court would transpose the words to answer the Testator's Intent. Salk. 236. Duncomb and Duncomb—Coulson and Coulson, vol. ii. Eq. Cases Abr. 318.

That this was a new Question, and there were no Authorities in point, though some came very near the present; and what was wanting in some Authorities, was made up by other Cases. If this had been the Devise of a Trust, then the Case of Bagshaw and Spencer would have determined it, but the difficulty arises from considering it is a Devise of a legal Estate: if this is to be considered upon the foot of Duncomb and Duncomb, and Coulson and Coulson, in which Cases the Court held that the Estate for Life subsisted in the first taker, with a Remainder in Tail after the Estate to the Trustees, to preserve, &c. and that the Estate for Life was not merged; if this should be thought the same Case, then GEORGE SAYER will be as much enabled to bar his Issue, as if he had an Estate Tail executed; for by a Recovery he may bar the Issue, because the Vouchee comes in of all his right, as Cuppledike's Case, 3 Co. Reports.

Sayer against
Mafferman.

To consider this Case, 1st, upon the reason of the Cases and Authorities in Law, before the Cases of Duncomb and Duncomb, and Coulson and Coulson. 2dly. How the Case stands since those Cases, and how this is distinguishable from them.

The Case of Luxford and Cheek, 1 Eq. Ca. Abr. 179. is a clear Case, and shews that the Court can transpose words to answer the Intent of the Parties; and so would place the Limitation to Trustees, to preserve, &c. before the Limitation to the Child and Children of EVERARD SAYER. In the Clause in this Will relating to the Family Pictures, the word "entailed," plainly shews the Testator intended a strict Settlement. In the first part of the Will, it is an express Devise to EVERARD SAYER for Life, with a Limitation to his Child and Children, which in a legal sense would be only an Estate for Life. Then there is an Estate for Life to GEORGE, Remainder to the Heirs

of

Sayer against
Maffermee.

of his Body, Remainder to Dr. RUNDLE, during the Life of GEORGE, in Trust to preserve Contingent Remainders; which words explain the Testator's Intention, as does also the Clause that relates to the Succession; and certainly the Testator intended, when the Estate came into possession, to do equal justice to both the Brothers. As to the Limitation in Trust to preserve, &c. the Testator clearly intended to give the Trustee a power to enter for the Forfeiture, and this should be a Limitation to the Trustee in Fee; for otherwise his Intention could not be answered. See the Case of Shaw and Weigh, 1 Eq. Ca. Abr. 184. The Powers given in the Will of making a Jointure and Leases, though not of themselves sufficient to convert an Estate Tail into an Estate for Life, yet they are material with the other circumstances, and "*juncti juvant.*" It has been a long doubt, whether the Testator's Intention, or the legal sense of the words, should prevail; some Judges have thought one way and some another: but it now seems settled, that the Intention ought to prevail; indeed an Intention manifestly against the Rules of Law shall not prevail, as when a Fee is limited upon a Fee, or a Devise of a term for years, for a longer time than the Law admits of; but the difficulty is, where there is an express Estate for Life, Remainder to the Heirs of the Body. In a Deed, these would be considered as words of Limitation, but in a Will are words of Purchase.

That the words "Issue, Child and Children, Son," shall be words of Limitation in a Will, though otherwise in a Deed. Where it is in equilibrio, what the Testator intended, the legal sense shall prevail. In the Case of Papillon and Voice, 2 P. Will. 471. Sir Joseph Jekyl was of opinion, that where there is a Limitation to Trustees to preserve, &c. and the next Limitation is to the Heirs of the Body, they are to

be

be considered as words of Purchase; and it is stronger in the present Case, by reason of the Limitation to the Child and Children of EVERARD SAYER. Shall the legal construction in respect to one Devise follow the Intent, and the Intent follow the legal construction in the other? If EVERARD SAYER is to take in possession only an Estate for Life, Remainder to his Children by purchase, why should not GEORGE SAYER, the younger Brother, do the same?

Sayer against
Maisterman.

As to the Question, since the Cases of Duncomb and Duncomb, and Coulson and Coulson, this Case is plainly distinguishable from those two Cases: though this may not be the Case of a Trust executory, where the Parties are to come into a Court of Equity for a Conveyance, yet there are words in this Case stronger than in the Case of Bagshaw and Spencer.

Here are words of strict succession, "the Males are to be preferred before the Females," which words are not in the Case of Coulson and Coulson; so the words "to the Child and Children" of EVERARD SAYER, are not in that Case; and therefore this is clearly distinguished from that Case: But the Authority of Coulson and Coulson has been much doubted; and if the principles of that Case are doubted, the Court will be astute in finding out a difference between that and the present. The Case of Bagshaw and Spencer was determined upon the foot of its being an executory Trust; and the Limitation to the Trustees to preserve, &c. in the present Case, is a strong evidence of the Testator's Intention, that this should go in strict Settlement: where the Court is to direct a Conveyance, they will never direct it to Trustees to preserve, &c. and insert no Contingent Remainder afterwards to be preserved. If the words "Trustees to preserve, &c." are not inserted, the Testator's Intention is not com-

Sayer against
Maisterman.

plied with; and therefore Lord Hardwicke said, in the Case of Bagshaw and Spencer, "If I must depart from the words of the Will, I will depart from them to carry the Intention of the Testator into execution, and not to defeat it." The Case of Lisle and Gray, Sir T. Jones, 114, reported also in Pollexfen, and Sir T. Raymond, is a very strong Case, arising upon a Deed.

Here is a succession pointed at, which makes it like the Case of Lisle and Gray: And what the present Case wants of being like Lisle and Gray, is supplied by the Case of Bagshaw and Spencer, and these two Cases taken together, ought to rule and govern the present.

Lord Commissioner WILLES:

As I have not been able to look particularly into all the Cases cited, if I had any doubt, I should have desired time to have considered of the Case; but I take it to be a very clear one. The Question is no more than this, Whether the Plaintiff Dr. SAYER can make a good Title to this Estate? and upon this arises another Question, whether by this Will he took an Estate for Life or in Tail? In respect to all legal Devises, Courts of Equity must determine in the same manner as Courts of Law would do, and are bound to do so; nor can Courts of Equity go so far, in the Case of Wills, as in the case of Articles and executory Trusts: for in respect of Wills, they are bounded and limited to determine according to Law; whereas in Articles and Trusts, Conscience is to be the Judge, and they may determine as they please.

The word "Estate," in this Will, must mean the Lands themselves, and not the interest in the Lands. I agree with the principles that
have

have been laid down, that in the construction of Wills, all the words of the Will are to be taken together, and that the Intention of the Testator shall take place, if not contrary to the rules of Law.

Sayer against
Mafterman.

Yet the Determinations seem now to have gone something further; that if it was manifest and plain the Testator intended otherwise, his Intention shall controul the legal sense: but if the words are clear and plain in the legal sense, though there are words that imply he might by possibility intend otherwise, yet these words shall not controul the legal sense. As to the Estate to EVERARD SAYER, in the first part of the Devise, I do not think this so clear, that the Testator intended him only an Estate for Life; but however I think clearly the Testator intended to give a different Estate to GEORGE SAYER from what he did to EVERARD: and I think this is founded on good reason; for he might not design to give the first taker a power of barring his second Brother in favour of remote Heirs. If a man makes use of different words, he must certainly mean a different sense: And this is a rule in the construction of Acts of Parliament, Deeds, and Wills. As to the word, "entailed," in the Clause relating to the Pictures, the Argument is so weak, I think nothing can be collected from it: it might mean an Estate Tail in GEORGE as well as his Son, but I think nothing can be made of it; and as to the words of succession, "the Males to be preferred, &c." these words will be answered as well by giving GEORGE an Estate Tail as an Estate for Life: and as to the Limitation to Dr. RUNDLE, "in Trust to preserve Contingent Remainders;" the Testator could only mean an Estate for life to him. But it is certain he did not understand these words, nor the use or effect of them; and therefore must I controul plain words, that have a legal sense and operation, from doubtful words of the Testator,

Sayer against
Masterman.

which he did not understand himself. As to all the Cases that have been cited, there was an express Estate for Life given, except in the Case of Lowe and Davies, 2 Lord Raymond, 1561: and there the subsequent words were held to be explanations of the former, and to correct their legal sense. Where a man gives an Estate for Life (if he is not a Lawyer) it is most probable his Intention is not to give any greater Estate, yet the Law will give the first taker an Estate Tail, if the subsequent words will extend to enlarge his Estate; therefore the Testator's Intention must be consistent with the Rules of Law.

Lord Commissioner SMYTHE:

As to the Devise to EVERARD SAYER, I think it is to be laid out of the Case now; though even there I think there are very strong words of implication to carry an Estate Tail: but in the Devise to Dr. SAYER, there are strong technical words; and in all the Cases where Estates Tail have been narrowed to Estates for Life, there was a clear and manifest Intention of the Testator. Where there is a Limitation for Life, with several intermediate Limitations, Remainder to the right Heirs of the Body of the first taker, these will be words of Limitation, and not of Purchase, and will carry an Estate Tail, though not executed: and as to the Limitation to a Trustee for Life, "to preserve Contingent Remainders," it is the same thing as if there had been such Limitation to any other person for Life, for this would only have postponed the execution of the Estate Tail. As to the words, "the Males having preference, &c." these are no more than the Law would imply, and therefore, "expressio eorum quæ tacita insunt, nihil operatur;" and to this point, is the Case of Legate and Sewell,

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Sewell, 1 P. Will. 87. where there were strong words of succession, viz: "severally and successively as they should be in priority of Birth, &c." and yet it was held to be an Estate Tail by three Judges, against Mr. J. Tracey. Papillon and Voyce; 2 P. Wms. 471. where A, devised Lands to B. for Life, without Waste; and from and after the determination of that Estate, to Trustees and their Heirs, during the Life of B. to preserve Contingent Remainders, Remainder to the Heirs of the Body of B. Remainder over; this was held to be an Estate Tail by Lord King, and this Determination hath been greatly applauded; and yet here were strong circumstances of the Testator's Intention, that B. should have only an Estate for Life. In King and Melling, 1 Vent. 225. Lands were devised to A. for Life, and after his decease, to the Issue of the Body of A. by a second Wife, with a power to A. to make a Jointure. Lord Chief Justice Hale held this to be an Estate Tail in A. and his Opinion was affirmed in the Exchequer Chamber, and yet here were strong circumstances to shew the Testator intended only an Estate for Life; for there was not only an express Estate for Life given with a power to make a Jointure, but the Remainder was to the Issue of the Body of A. which was an Estate Tail by implication; and the same words in a Deed would not have made an Estate Tail. Shaw and Weigh, 1 Eq. Ca. Abr. 184. which was also held an Estate Tail. Langley and Baldwin, ditto, 185. There was an express Estate for Life to J. S. without Waste, with a power to limit a Jointure, Remainder to the first Son, and so to the sixth; and then devised, that if J. S. the Grandchild should die without Issue Male, Remainder over; it was held that J. S. took an Estate Tail. The best use of Cases is to draw settled rules and principles from them: now these prove, that where there is an express Estate
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for Life, it shall be enlarged by implication; and where there is a Limitation to the Heirs of the Body, after an Estate of Freehold, this will enlarge an Estate for Life to an Estate Tail, as well in the Case of a Will as a Deed; and therefore I am clearly of Opinion in this Case, that GEORGE SAYER took an Estate Tail.

Lord Commissioner WILMOT:

The Question upon the construction of Wills, whether a person takes an Estate for Life or in Tail, has been very much agitated, and yet remains so much undetermined, that Counsel must still find it very difficult to give an Opinion that can be depended upon; and I think it would have been of great service to the public, and tended to render property less precarious and uncertain, if the legal construction of words in a Will had never been departed from; for it must be much better, that every person's Intent should be subservient to the Rules of Law, than that the Law should be subservient to the parties Intent.

There are two Questions arise in this Case, first, whether the Inheritance vested in Dr. RUNDLE the Trustee, to preserve Contingent Remainders? 2dly, Whether GEORGE SAYER took an Estate for Life, or an Estate Tail in Remainder? for if he took an Estate Tail in Remainder, he, having now levied a Fine, can make a good Title to a Purchaser, and we must decree the Articles to be carried into execution.

As to the first point—Upon the opening, I thought this a very material thing to be made out, for if it did, it would have been the Case of Bagshaw and Spencer; but I think it is very clear the Inheritance was not vested in Dr. RUNDLE, for the Testator never distinguished the

the legal from the equitable Interest in his mind through this whole Will, and it is clear he did not know the meaning, or the use and effect of Trustees to preserve Contingent Remainders: but I suppose he had heard that they were made use of to keep an Estate in a family, and he might consider them as a Receipt for that purpose, however thrown into a Will. If the Devise had been to Dr. RUNDLE and his Heirs, during the Life of GEORGE, to preserve, &c. I should have thought it a descendable Freehold, and that the Trust should have continued and been co-extensive with the legal Estate. As to the word "Estate," giving a Fee to Dr. RUNDLE, it is clear it was only descriptive of the Lands; for in the first part the Testator says, "my Estate and Farms in B." so it is clear he did not mean the Interest in the Lands, but the Lands themselves.

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The next Question is, whether the Limitation to Trustees to preserve Contingent Remainder, will turn the words, "Heirs of the Body," into words of Purchase? We are bound to determine this Case by the Rules of Law, though sitting in a Court of Equity, this being a legal Devise. In the Case of an Executory Trust, this Court has power to form and mould Estates, to answer the Intention of Parties; but in the Case of a legal Devise, we are as much bound to determine by the Rules of Law, as if ~~we were~~ trying an Ejectment at the Assizes, or determining upon a special Verdict in a Court of Law at Westminster Hall.

The Rule certainly is, that the Testator's Intention shall prevail, if not contrary to the Rules of Law; and I think we might in this Case, upon the Authority of Luxford and Cheek, 3 Lev. 125. transpose the words to answer the Intent of the Parties: but if we were to do so, it would leave this Case under the same circumstances with Coulson and Coulson, or not so well.

This

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This is a much agitated Question, and it were to be wished some certain Rule was found out to judge by; and I think a Rule may be found out and adhered to inviolably, where there is a Devise to the Heirs of the Body of a Person in the plural number, without words of Limitation superadded: and this Rule is laid down in Shelley's Case, Co. Rep. viz. "That wherever an Estate is limited, mediately or immediately, to the Heirs of the Body of a person that takes an Estate of Freehold by the same Instrument, the words, "the Heirs of the Body," shall be words of Limitation and not of Purchase." The reason of this Rule may now have ceased with the abolition of feudal Tenures; for it certainly was introduced to preserve the Duties to the Lord of the Fee; and I think if this Rule had never been departed from, it would have been better for the public in general, though it might have proved prejudicial to some individuals. For it renders property very precarious, that Judges should excruciate themselves to find out the Testator's meaning and intention; and though this has been done in some particular Instances, I should not be for carrying it one step further. Now there is not one Case, except Lowe and Davies, 2 Raym. 1561. which was a Devise "to A. for Life, Remainder to the Heirs of his Body, that is to say, to his first and other Sons;" (and this stands upon very particular circumstances, for here the Testator revokes the Devise in the same breath, and explains what Estate he intended to give:)—but there is no one other Case, where the words, "Heirs of the Body," in the plural number, without words of Limitation superadded, have been construed words of Purchase.

Archer's Case, 1 Co. 66. A man devised to A. for Life, and after to the "next Heir Male, and the Heirs of the Body of such Heir Male;" this was held an Estate for Life in A.; for the words of Limitation are

grafted on the Estate of the Heir in the singular number, and therefore he shall take by Purchase.

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Clerk and Day, Cro. Eliz. 313. where one devised Lands to his Daughter for Life, and if she married after the Testator's decease, and had Heirs of her Body, then "I will, that the Heir, after my Daughter's death, shall have the land, and to the Heirs of their Body begotten; and if my Daughter die without Issue of her Body begotten," Remainder over: this was held an Estate for Life by two Justices, against the Opinion of Lord Chief Justice Popham; but this was also to the "Heir" in the singular number, with words of Limitation superadded. Lisle and Gray, Sir Thomas Raymond, 278. Lands were limited to A. for Life, Remainder to his first and every other Son in Tail Male, and so severally and respectively to every of the Heirs Male of the Body of A. and the Heirs Male of the Body of such Heirs Male. Here the words "Heirs Male," were understood to signify "Sons," and to be words of Purchase. This is a Limitation in effect in the singular number, and there are words of Limitation superadded.

Waker and Snow, Palmer, 359. This was also in the singular number, and words of Limitation were superadded. There are four Cases where a Devise to the Heir Male in the singular number, with words of Limitation superadded, have been held an Estate Tail.

Pawsey and Lowdall, 1 Roll. Abr. 626. and Burleigh's Case, cited in King and Melling. Dummer and Trollop, Mich. 9 Geo. II. which was a Devise to first Son in Tail Male, then to second Son for Life, Remainder to his Heirs Male; this was held an Estate Tail: also Miller and Seagrave, Mich. 10 Geo. I.; which Cases clearly shew, that the words of Limitation superadded have been construed as the operative words. In the Case of Papillon and Voyce, there was an

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express Estate for Life, and yet Lord King held this to be an Estate Tail. In Legate and Sewell, though words of Limitation were super-added, it was held an Estate Tail in the first taker. James and Richardson, 1 Vent. 334. Burchett and Durdant, 2 Vent. 311. A man devises Lands to A. and his Heirs, during the Life of B. and after the Decease of B. to the Heirs male of the Body of B. now living, B. having one Son then living; by the Devise, a Remainder was immediately vested in the Son. It was also determined to be a Trust not executed. This must be a mistake, for the Statute mentions a Trust as well as an Use; but if they proceed on this, then the first taker took no legal Estate. Jones, v. Lord Saye and Sele, Eq. Ca. Abr. 383. c. 4. A legal Estate and an equitable Interest, will not consolidate and unite. As to the Case at Bar, I think the Cases of Duncomb and Duncomb, and Coulson and Coulson, rule and determine the present. And though the Authority of this last Case has been doubted, yet I think Lord Hardwicke, in the Case of Bagshaw and Spencer, 1 Vez. 142. rather confirmed its Authority than impeached it: and whilst these Cases stand, they must determine the present; though I think the present a much stronger Case than either of them, as there was, in both the others, an express Estate for Life given.

This is a legal Question, and we must determine it according to the Rules of Law; we are bound to do it. The inserting a Remainder to "Trustees to preserve, &c." had a legal operation; for these words could prevent the Wife from being endowed. In the present Case, here is no express Estate for Life; it is not given to the Heir in the singular number, and there are no words of Limitation super-added.

If the words had been, "Heirs Male," there might have been some doubt; but what can be done with the words, "Heirs of the Body?"

Body?" Suppose there had been three Daughters of GEORGE SAYER; if they are to take by Purchase, they must be Joint-tenants for Life, with several Inheritances and Cross-Remainders to each other. What a confusion would this introduce! We might do it indeed in an executory Trust, but we cannot do it in the Devise of a legal Estate. Suppose Trustees to preserve Contingent Remainders had been inserted in the proper place, I do not think it would be by any means clear that the Testator did not intend that GEORGE SAYER should not have an Estate Tail: I do not believe he knew what he meant by inserting "Trustees, &c." how then is it possible for us to find it out? And if his Intent had been ever so apparent, it must be agreeable to the Rules of Law. Suppose one devises to A. and the Heirs of the Body of A. and says, "I declare that the Heirs of the Body of A. shall take by Purchase," can the Intent be more manifest and express? And yet A. shall have an Estate Tail; for the Testator shall not be permitted to controul the legal operation of the words.

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Vide Mr. Hargrave's Law Tracts, 1 vol. p. 562. 572. 3. and Mr. Butler's Co. Litt. p. 376. b.

Therefore, upon the whole, I entirely concur with my Lords Commissioners, "That GEORGE SAYER took an Estate Tail; and that, "having levied a Fine, he is enabled to make a good Title to a Purchaser; and that these Articles ought to be carried into execution."

Their Lordships ORDER and DECREE accordingly; but do not think fit to give COSTS on either Side.

F I N I S.

5/6/89

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